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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DARYL GATES, et al.

v.

DOLORES LANGFORD, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

JAMES K. HAHN, City Attorney
LEWIS N. UNGER,
Assistant City Attorney
JACK L. BROWN,
Deputy City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-6494

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QUESTION PRESENTED

Whether the California Supreme Court erroneously construed the Fourth Amendment by holding that judicial approval is required before an "inherently dangerous" device can be used in the execution of a search or arrest warrant.

LIST OF PARTIES

The petitioners before this Court are identical to the named defendants in the proceeding below, and are as follows: Daryl Gates, in his official capacity as Chief of the Los Angeles Police Department; James M. Dumelle, in his official capacity as an officer of the Los Angeles Police Department; and Charles Uribe, in his official capacity as an officer of the Los Angeles Police Department.

The respondents before this Court are identical to the named plaintiffs in the proceeding below, and are as follows: Dolores Langford; Dyvon Randal Small, a minor, by Dolores Langford, his guardian ad litem; Eddie Langford IV, a minor, by Dolores Langford, his guardian ad litem; Thomas James Montgomery, individually and as a taxpayer; and Jessica Fiske, a taxpayer.

QUESTION PRESENTED

Whether the California Supreme Court erroneously construed the Fourth Amendment by holding that judicial approval is required before an "inherently dangerous" device can be used in the execution of a search or arrest warrant.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINION BELOW

The opinion of the California Supreme Court (App. A, infra, 1a-34a) is reported at 43 Cal.3d 21, 223 Cal.Rptr. 387.

JURISDICTION

The decision of the California Supreme Court was entered on January 2, 1987. A petition for rehearing was denied on February 26, 1987. (App. B, infra, 35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On February 6, 1985, the Los Angeles Police Department (Department) executed a search warrant at a heavily fortified residence on Louvre Street in suburban Los Angeles. Investigation convinced Department officers that the location was a rock house, a location where a type of drug called rock cocaine is sold. With the increase in drug trafficking in Southern California, these locations have proliferated, creating a major drug enforcement problem. (App. 1a, 3a-4a).

The word "rock," though descriptive of a type of drug, could just as well describe the fortifications at these locations. Rock houses are routinely equipped with steel bars on exterior windows and are entered by way of multiple steel doors. A typical installation has a mesh entry door providing access to a barred "cage" wherein the drug transaction takes place by way of a slot leading to the inside of the house. Typically, a second steel-reinforced door leads from the cage directly to the interior of the house or to a third door that is the actual entry door to the house. Fortifications on the interior of the location may include steel bars and mesh over the inside windows, multiple deadbolts on doors, and thick boards or beams bolted across doors and windows. (App. 3a-4a).

Having determined that the Louvre Street location was a heavily fortified rock house, and because they had cause to believe that the occupants were armed and dangerous, Department officials determined that the safest method of entry would be to employ a motorized ram to penetrate a wall of the house. Once inside, Department officers were prepared to use "flash bang" explosive devices to divert and disarm the occupants. (App. 2a-4a).

The motorized ram was a converted V-100 military personnel carrier, to which a long steel pole ending in a square iron plate was attached. On February 6, 1985, the ram was used to knock a hole in the front of the Louvre Street residence large enough to enable officers to enter. Once inside, they detonated a number of flash bang devices. No one was injured during the episode, and a small amount of narcotics and narcotic paraphernalia was recovered. (App. 2a-4a).

Respondents are persons who were in the residence at the time of the police entry. They brought an action for damages, and declaratory and injunctive relief in state court, contending that the Department's policy allowing use of the motorized ram and flash bangs to enter residences constitutes inherently excessive force which is unreasonable per se under, *inter alia*, the Fourth, Fifth, Ninth, and Fourteenth Amendments. (App. 2a-3a).

Respondents sought and were denied a preliminary injunction in the trial court. Their petition for writ of mandate filed in the California Court of Appeal was summarily denied on procedural grounds. Finally, they petitioned the California Supreme Court for review, and the court ultimately issued the opinion that is the subject of the instant petition. (App. 3a, 6a-7a).

In its opinion, the California Supreme Court concluded (1) that judicial approval was required before the ram

could be used to serve a warrant, and (2) that approval was not required before a flash bang could be used. The distinction between the two devices was based solely upon the court's assertion that the ram is "inherently dangerous," while the flash bang is not. (App. 2a).

Relying on *Dalia v. United States* (1979) 441 U.S. 238, petitioner argued that the Fourth Amendment does not require judicial oversight of tactics or devices used in the execution of a search warrant. The court disagreed, holding that *Dalia* is factually distinguishable in two ways. First, the issue in *Dalia* was whether a separate warrant was required before federal officers could enter a business office covertly to install a judicially authorized wire tap. The *Dalia* court held that such authorization was implicit in the original warrant. Distinguishing *Dalia*, the California Supreme Court said: "Authority to make a forced entry by means of a powerful armed vehicle that smashes blindly though walls of a residence is by no means implicit in a routine warrant to search for contraband." (App. 10a). Second, the California Supreme Court quoted *Dalia* for the proposition that "covert entry involves minimal destruction of property and danger to persons" (*Id.*), and concluded that "the motorized battering ram is usually not the least destructive, safest, or only method of conducting such a search." (*Id.*).

In addition to requiring judicial authorization prior to the use of the ram, the court listed the factors which a magistrate must balance before permitting its use: "... the reliability of the ram under the specific circumstances as a rapid and safe means of entry, the seriousness of the underlying criminal offense and society's consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of the crime will be destroyed, the importance of the evidence sought, and the

possibility that the evidence could be recovered by alternative means less violative of Fourth Amendment protection." (App. 12a).

Petitioners filed a petition for rehearing arguing, *inter alia,* that requiring judicial authorization for "inherently dangerous" police tactics or devices would adversely impact the effectiveness of law enforcement in that a large part of police work is inherently dangerous or involves tools or devices which are inherently dangerous. The petition for rehearing was denied. (App. 35a).

REASONS FOR GRANTING THE PETITION

In its decision below, the California Supreme Court construed the Fourth Amendment[1] as requiring the police

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[1]Although the California Supreme Court based its decision on the Fourth Amendment, it also referred obliquely to Article I, § 13 of the California Constitution. This reference could not, however, constitute "an independent and adequate state ground" for the decision (*Michigan v. Long* (1983) 463 U.S. 1032, 1041-1044) and, thus, could not insulate the California court's decision from this Court's review. *See e.g. Texas v. Brown* (1983) 460 U.S. 730, 732, n. 1; *Michigan v. Long, supra,* 463 U.S. at 1041-1044; *Delaware v. Prouse* (1979) 440 U.S. 648, 651-653. Indeed, after the mere mention of the California constitution in the opening paragraph of its opinion and one additional reference in summarizing the claims respondents had alleged in their complaint, the court neither cited nor mentioned the state constitution again. Instead, the court focused on the Fourth Amendment and discussed opinions of this court (*Johnson v. United States* (1948) 333 U.S. 10; *Dalia v. United States* (1978) 441 U.S. 238) and its own opinion (*People v. Scott* (1978) 21 Cal.3d 284), all construing the Fourth Amendment, to reach its decision. In her concurring and dissenting opinion, Chief Justice Bird acknowledges the majority's reliance on the Fourth Amendment (App. 22a, 24a), as does Justice Lucas in his dissent. (App. 33a). Clearly, since the California Supreme Court based its decision upon the Fourth Amendment, this court has jurisdiction to review that decision. (*Michigan v. Long, supra,* 463 U.S. at 1040-1041).

to seek judicial permission whenever the use of an "inherently dangerous" tactic or device in the service of a warrant is contemplated. While this Court has recognized that a showing greater than probable cause is required for the issuance of a warrant to compel a surgical intrusion into an individual's body for the recovery of evidence (*Winston v. Lee* (1985) 470 U.S. 753), requiring such a showing where the subject of the search is a building, even where the method for gaining entry to conduct the search involves use of a potentially dangerous object, is unprecedented.

The drug problem confronting this country is severe. In Los Angeles, sophisticated drug dealers build small fortresses where laws are flaunted and drugs are openly sold. The response of the Department, after procuring a search warrant for such locations, has been to use a motorized ram when, in their best judgment, its use reduces the likelihood of an armed confrontation with the occupants. The V-100 ram, while certainly a novel tool in the Department's arsenal, is not the only piece of equipment with the potential to cause serious property damage or death. Explosive devices to blow open doors, high-temperature cutting tools to burn through steel, tear gas grenades, and, indeed, firearms are all examples of "inherently dangerous" devices which officers use to gain entry into search locations. The California Supreme Court's opinion compels the police to seek a magistrate's permission before these "inherently dangerous" pieces of equipment are used in the execution of a warrant.

Unless reversed, the impact on police agencies will be profound. The ability to respond to rapidly changing circumstances is the hallmark of effective law enforcement, and is needed to accord society the greatest degree of protection from the criminal behavior of certain of its citizens. Restricting law enforcement to that equipment

approved by a magistrate many hours or possibly days before a search, is cumbersome, impractical, and unreasonable.

The law has always acknowledged that police work is fraught with the need to respond to exigencies. These exigencies provide an exception to the knock-notice requirement (*Ker v. California* (1963) 374 U.S. 23) and in some circumstances obviate the need for a warrant altogether. (*Maryland Penitentiary v. Hayden* (1967) 387 U.S. 294, 298). In essence, the opinion below would render law enforcement legally unable to respond to rapidly changing situations without first seeking judicial approval. Practically speaking, this would be an unworkable situation.

In *Dalia v. United States* (1979) 441 U.S. 238, this Court established two propositions relevant to the instant case. First, "[i]t is generally left to the discretion of the executing officer to determine the details of how best to proceed with the performance of a search authorized by warrant . . . ". *Id.* at 258. Second, any claim that the method of search violated the Fourth Amendment is properly raised only after the search is conducted: ". . . the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Id.* The failure of the opinion below to follow the teachings of *Dalia* should be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
JAMES K. HAHN, City Attorney
LEWIS N. UNGER,
Assistant City Attorney
JACK L. BROWN,
Deputy City Attorney

By JACK L. BROWN
Deputy City Attorney

Supreme Court
Filed January 2, 1987
Laurence P. Gill, Clerk, Deputy

APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

L.A. 32105 (C.A. 2/4 B014815)
(Super. Ct. No. C535405)

DORIS LANGFORD et al.,
Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
DARYL GATES, as Chief of Police, etc., et al.,
Real Parties in Interest.

We granted review in this case to determine whether the Los Angeles Police Department (LAPD) should be enjoined from using a motorized battering ram and pyrotechnic explosive devices known as "flashbangs" to execute searches of so-called "rock houses," which are specially fortified residential dwellings where crystallized "rock" cocaine is made and sold. As will appear, we are persuaded that the unregulated use of the motorized battering ram, but not the flashbangs, poses a significant and unusual threat to property and public safety that may, unless subject to judicial scrutiny, contravene the proscription against unreasonable searches contained in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution.

In light of the deliberate, often prolonged, planning that the LAPD undertakes before it deploys the device, prior judicial review of its proposed use of the ram against suspected rock houses is unlikely to obstruct

SEE CONCURRING AND DISSENTING OPINIONS.

APPENDIX A

IN THE SUPREME COURT
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We granted review in this case to determine whether the Los Angeles Police Department (LAPD) should be enjoined from using a motorized battering ram and pyrotechnic explosive devices known as "flashbangs" to execute searches of so-called "rock houses," which are specially fortified residential dwellings where crystallized "rock" cocaine is made and sold. As will appear, we are persuaded that the unregulated use of the motorized battering ram, but not the flashbangs, poses a significant and unusual threat to property and public safety that may, unless subject to judicial scrutiny, contravene the proscription against unreasonable searches contained in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution.

In light of the deliberate, often prolonged, planning that the LAPD undertakes before it deploys the device, prior judicial review of its proposed use of the ram against suspected rock houses is unlikely to obstruct

SEE CONCURRING AND DISSENTING OPINIONS.

effective law enforcement. Therefore we conclude that a writ of mandate should issue directing the trial court to enjoin deployment of the ram to execute search or arrest warrents unless a magistrate authorizes its use, and unless exigent circumstances arise at the time of entry. On the other hand, since we are not convinced that the flashbangs are inherently dangerous, we rely on the discretion of law enforcement agencies to determine when and under what circumstances they are to be used.

Petitioners (hereinafter plaintiffs) are taxpayers and individuals who occupied a suburban Los Angeles residence on the evening of February 6, 1985, when it was forcibly entered by LAPD officers using a motorized battering ram to penetrate a wall of the house and flashbangs to divert and disarm its occupants. The police were executing a search warrant issued several days earlier after an informant made a controlled purchase of rock cocaine through a metal slot in the front door.

The LAPD had engaged the assistance of Special Weapons and Tactics Team members to break into the house, after concluding that iron bars over its windows and an electronically controlled locked "cage" at the front entrance precluded rapid entry by less dramatic means. The police chief invited the news media to witness the first use of the "V-100," an armored personnel carrier equipped with a battering ram. In front of television cameras and without prior warning to the occupants — other than a bystander's shouts of "Police!" — the officers drove the ram through the exterior wall of the house and into a family room; simultaneously, police detonated flashbangs in the room and entered in full force. As it turned out, the house was occupied by two unarmed women and their three young children; the officers recov-

ered no weapons and only trace amounts of cocaine along with alleged drug paraphernalia.

Plaintiffs brought an action for damages and declaratory and injunctive relief on federal and state grounds, contending that the LAPD's practice of using the motorized battering ram and flashbangs against residences constitutes inherently excessive force which is unreasonable per se under the Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution, and article I, sections 1, 7, 13, and 15 of the California Constitution. Real parties in interest (hereinafter defendants) removed the action to federal court, which remanded to state courts all claims with the exception of a damage action under a federal civil rights statute. By then — in May 1985 — the LAPD had used the devices in a total of four searches of suspected rock houses.

Plaintiffs applied for a preliminary injunction, urging that the ram and flashbangs be prohibited in searches of occupied dwellings. At the hearing, however, they stipulated that they did not seek to restrict LAPD deployment of either device "if such use reasonably appears necessary to stop an ongoing threat of immediate serious injury or death" such as in a terrorist or hostage scenario.

Defendants responded that the use of the devices was entirely justified by the unique problems for law enforcement posed by the fortress-like rock houses proliferating in residential areas. Rock houses are typically equipped with steel bars on exterior windows and are entered by way of multiple steel doors: a mesh entry door provides access to a barred "cage," and a second steel-reinforced door may lead from there to the interior of the house or to a third door that is the actual front door. Officers can usually only surmise the extent of interior hardware, which may include steel bars and mesh over windows on the inside of the house, multiple deadbolts on interior and

exterior doors, and thick boards bolted across entries. Even approaching such operations may be dangerous to law enforcement officers as rock houses may monitor outside activity by means of cameras and other electronic surveillance devices.

Defendants averred that the fortifications of the house in question appeared more elaborate than those installed on other houses in the neighborhood to avert burglaries — although they conceded their preliminary investigation was hampered because their informant could not see into the interior of the house. The informant's purchase of cocaine confirmed LAPD suspicions that is was a rock house: the informant was "buzzed" into the front cage, the exterior door of which was locked after entry, he exchanged cash for rock cocaine through the door slot, and he was released after being "buzzed" out. Furthermore, raids against two similarly fortified houses owned by the same individual suspected of owning the target house had yielded cocaine and weapons, and neither had contained clothing or furnishings indicating the presence of regular occupants.

On the basis of the 2 previous raids and of the statistically high incidence of weapons in rock houses generally — between October 1984 and February 1985, police seized 207 guns in 269 operations against such houses — the LAPD anticipated armed resistance. Moreover, because of the elaborate ironworks of the exterior entrances, they concluded it would be impossible to enter by conventional methods before evidence was destroyed.

Defendants went on to describe the engines of war that are the subject of the present action. Each V-100 armored personnel carrier is mounted with a 14-foot horizontal steel pole capped with a rectangular steel plate. Driven at approximately five miles an hour against the exterior wall of a building and then withdrawn, it creates a hole large

enough for several officers to enter simultaneously. Although approved by the department for use in nine raids, the motorized rams have actually been deployed only four times, with no physical injuries to persons or major damage to buildings, either stucco or brick. Plaintiffs contended this apparent safety record is misleading, warning that according to their experts structural damage could be catastrophic, resulting in serious injuries through flying debris, collapsed ceilings, and even explosion and fire.

Defendants asserted that flashbangs have proved particularly effective in safely disarming dangerous individuals, by temporarily blinding them with a brilliant flash of light and confusing them with artillery-like sounds. Since they were introduced into the police arsenal in 1982, flashbangs have been approved by the department for use 38 times, on 25 occasions in 1985 alone. Defendants introduced expert testimony showing that flashbangs are designed exclusively to produce dramatic pyrotechnics, not to injure, and should cause only minor skin burns at worst. This has proved true, with a single tragic exception: a woman was killed in December 1984 when a flashbang exploded between her back and a wall. The LAPD accounts the death a "freak" accident, but has taken measures to preclude a similar mishap by reducing by half the explosive power of the device and requiring that officers detonate them only after they have seen fully into a target area. No other injuries have been reported.

Defendants maintained that although dangerous, the devices do not constitute deadlier force than many of the conventional tools — including tear gas, hand-held battering devices, and explosives applied directly to deadbolts — long used for forcible entry. They argued that a blanket prohibition against a particular device, subject to magistrate approval, is without precedent.

Moreover, such review would duplicate the careful prior screening already conducted by police administrative panels, which approve deployment only when either device is the safest means of accomplishing a speedy forced entry. Finally, they insisted that injunctive relief is unavailable: courts may review the LAPD's use of any particular weaponry only retrospectively, on a case-by-case basis.

The trial court agreed with defendants. It denied plaintiffs' motion for injunctive relief concluding that although they might eventually establish that the motorized battering rams and flashbangs are unreasonable per se, they had submitted insufficient data to demonstrate a current policy of misuse by the LAPD. It observed that short of banning the devices outright, it lacked authority to regulate or condition their use except by requiring prior judicial authorization for nighttime service.

Although it denied the motion on the ground that "it's a mistake for the court to interfere in the first instance," the court expressed misgivings about use of the motorized battering ram without judicial oversight: "Waking people after 10 o'clock you have to get the magistrate's permission. Knocking a large hole in a wall of a residence where people might be sleeping, you don't have to get a magistrate's permission." It "question[ed] the wisdom" of LAPD policy, urging "The judgment having been made to use the ram, why can't you tell the magistrate on an honest basis that this is a situation that calls for the battering ram and we are seriously contemplating it?"

Plaintiffs petitioned the Court of Appeal for a writ of mandate to compel the trial court to grant preliminary injunctive relief. The Court of Appeal summarily denied the petition on the ground that plaintiffs have an adequate remedy by appeal. We granted plaintiffs' petition for review and issued an alternative writ of mandate. In so

doing we necessarily determined that plaintiffs lack a "plain, speedy, and adequate remedy in the ordinary course of law." (Code Civ. Proc., § 1086; see Robbins v. Superior Court (1985) 38 Cal.3d 199, 205.)

A trial court's decision to deny provisional relief is discretionary and will be upheld if it is supported by sufficient evidence, even if there is evidence that could support a contrary conclusion. (See Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925-926.) A writ of mandate will issue to control the exercise of judicial discretion only when a court has acted capriciously or "where, under the facts, that discretion can be exercised in only one way." (Babb v. Superior Court (1971) 3 Cal.3d 841, 851; Robbins v. Superior Court, supra, 38 Cal.3d 199, 205.)

In deciding whether a preliminary injunction should issue, the trial court must evaluate two interrelated factors: "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70; accord, Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286.) Our inquiry into whether the court abused its discretion in the present case is therefore twofold: do plaintiffs demonstrate they are likely to prevail on the merits of their challenge to the LAPD's current practice of using motorized battering rams and flashbangs? And are they likely to suffer irreparable harm to their interests as individuals and as taxpayers if interim relief is withheld?

We conclude that plaintiffs fail to meet the foregoing requirements as to the flashbangs. We are not persuaded by their claim that flashbangs, like the ram, pose an

unacceptable threat to property and person. At their present reduced explosive power, and under current LAPD guidelines requiring that officers detonate them only after they have seen fully into a targeted room, the flashbangs appear from the record to present a minimal risk of injury — certainly a lesser risk than the use of guns to disarm hostile suspects. Flashbangs have been used without incident under the modification and restrictions instituted by the LAPD in 1984 after a single fatal accident; in more than 25 cases since 1984, the flashbangs have aided the police while inflicting only momentary disorientation on suspects. Because use of the flashbangs may not, therefore, be accounted unreasonable, the court did not abuse its discretion in denying a preliminary injunction against their use.

The motorized battering ram, however, present a more difficult problem. We first address the merits of plaintiffs' underlying claim that prior judicial authorization is required before officers use the battering ram, which is a destructive and dangerous means of forcible entry into an occupied dwelling.

Although defendants dispute the level of risk posed by the V-100 battering ram, they concede the potential danger from collapse of building walls and ceilings or through rupture of utility lines. Fire from damaged electrical wires or explosion from gas leaking from broken gas pipes could threaten the safety not only of occupants, but of entire neighborhoods. Because of the unprecedented risks to owners, occupants, and neighbors of suspected rock houses, therefore, routine deployment of the ram to enter dwellings must be considered presumptively unreasonable unless authorized in advance by a neutral magistrate, and unless exigent circumstances develop at the time of entry.

Defendants insist that short of an absolute ban on devices deemed unreasonable per se, judicial review of police tactics is limited to after-the-fact inquiry into whether the force used was excessive. We disagree. Although we have not previously imposed specific conditions on the use of any single weapon in the police arsenal, there is authority for requiring magistrate approval for especially dangerous and intrusive law enforcement practices. Penal Code section 1533, for example, permits nighttime service of an arrest or search warrant only on a showing of good cause and at a magistrate's discretion. Similarly, this court held that certain intrusive body searches without special warrant are presumed unreasonable even when performed incident to a valid arrest and on probable cause. (People v. Scott (1978) 21 Cal.3d 284.) Common to both limitations is the concern that the sensitive evaluation of unusual and dangerous intrusions affecting privacy and security interests of targeted persons should not be left exclusively to the "officer engaged in the often competitive enterprise of ferreting out crime." (Johnson v. United States (1948) 333 U.S. 10, 13-14.) Although searches of rock houses are directed against residences and not persons, the risk of incidental injury to human beings within the residences is reasonably foreseeable.

Defendants insist that the Fourth Amendment imposes no requirement of judicial oversight: "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant — subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.' " (Fn. omitted.) (Dalia v. United States (1978) 441 U.S. 238, 257.) Their reliance on *Dalia* is misplaced.

First, *Dalia* is distinguishable on its facts. It involved a warrant authorizing a telephone wiretap under 18 United States Code section 2518, and addressed the limited question of whether a separate warrant was required before federal officers could enter a business office covertly to install the device. The court found such authorization implicit in the original warrant: in virtually every wiretap, surreptitious entry is necessary and a separate warrant would prove an "empty formalism." (Id. at p. 258.) Second, covert entry involves minimal destruction of property and danger to persons; as the court noted, it is generally the safest — and often the only — means of executing a legal wiretap. On those grounds, the court held that covert entry is a reasonable means of executing a warrant for electronic eavesdropping.

Neither basis for the holding in *Dalia* applies here. Authority to make a forced entry by means of a powerful armed vehicle that smashes blindly through the walls of a residence is by no means implicit in a routine warrant to search for contraband. More important, the motorized battering ram is usually not the least destructive, safest, or only method of conducting such a search. Rather, it is so destructive that its use against residences generally infringes on occupants' and owners' rights to be secure against unreasonably searches and seizures.

Defendants insist we must defer in the first instance to police discretion. We do, in fact, yield to police discretion in the first instance as to the desirability of using mechanical force. But before such force is actually employed, the impartial judgment of a judicial officer must be interposed between citizens and the police. Thus the LAPD's use of the V-100 battering ram must depend on prior magistrate approval.

Defendants next contend that in any case before-the-fact review is precluded by Parsley v. Superior Court

(1973) 9 Cal.3d 934, because the LAPD uses the motorized battering ram only under exigent circumstances that cannot be assessed in advance. In fact, however, the LAPD itself makes just such a prior assessment under its current procedures: it approves use of the ram in specific cases not because an exigent situation is in progress, but because it strongly suspects that when the officers arrive at the scene they will be met with resistance to a legal search.

In *Parsley* we held that the magistrate was without power to authorize noncompliance with the announcement requirement of Penal Code section 1531, which provides that an officer may break open any part of a house to execute a warrant "if, after notice of his authority and purpose, he is refused admittance." We reasoned that failure to give notice could not be justified by the warrant provision alone: "the key to permissible unannounced entry is the knowledge of exigent circumstances possessed by officers at the time of entry. Thus, from the viewpoint of a court reviewing justification for an unannounced entry after the fact, a warrant authorizing such action adds nothing." (Id. at p. 940.) On the other hand, such a warrant would improperly allow the magistrate's decision to substitute for the immediate determination of the situation officers face at the moment of entry. (Ibid.)

The same objections, however, do not apply to the type of prior authorization proposed here. The magistrate would not be asked to presume that the police will face an exigency at a rock house, nor would he require the LAPD's actual deployment of the motorized battering ram: any use would still involve the threshold judgment of officers at the time of the search that an exigent situation had in fact developed — i.e., that evidence was in the process of being destroyed or that resistance to the search posed a serious danger of injury to police justify-

ing deployment of the battering ram. It would not be sufficient to conclude that the objects named in the search warrant are by nature amenable to ready destruction or that occupants of rock houses are generally disposed to resist searches; a specific showing of exigency is needed. (See People v. Dumas (1973) 9 Cal.3d 871, 878-879; People v. Gastelo (1967) 67 Cal.2d 586, 588-589; People v. Vollheim (1978) 87 Cal.App.3d 538, 543.)

The magistrate should decide only whether the motorized battering ram could be used with relative safety against a particular building, if the need arises during execution of a search or arrest warrant. The LAPD declares that it already conducts its own screening of the need for the device and deploys it only as an extreme measure and only if officers at the scene remain convinced it is necessary. Magistrate review would simply place that screening, and the decision whether use of the ram could be justified, in the hands of a neutral and independent judicial officer.

In *Scott* we established a balancing test that we now adapt to the present case. (See 21 Cal.3d at pp. 293-294.) Before authorizing potential use of the battering ram, the magistrate finding probable cause for the underlying search must apply an additional balancing test to determine whether use of the device is appropriate. Factors that must be considered include the reliability of the ram under the specific circumstances as a rapid and safe means of entry, the seriousness of the underlying criminal offense and society's consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of the crime will be destroyed, the importance of the evidence sought, and the possibility that the evidence could be recovered by alternative means less violative of Fourth Amendment protection. Alternative means include conventional methods of entry and such

procedures as abatement against the owner of the suspected rock house or criminal charges under Health and Safety Code sections 11366 and 11366.5, which are especially tailored to combat the proliferation of fortified houses.[1] All these considerations must, in turn, be balanced against the severity of the proposed intrusion: the likelihood of injury to innocent third parties as well as to occupants and police officers, and of extreme property damage to the target house and neighboring structures.

We conclude therefore that the motorized battering ram may be used in executing searches or arrests only after the LAPD satisfies three preliminary requirements: i.e., it (1) obtains a warrant upon probable cause, (2) receives prior authorization to use the ram from a magistrate, and (3) at the time of entry determines there are exigent circumstances amounting to an immediate threat of injury to officers executing the warrant or reasonable grounds to suspect that evidence is being destroyed.

Having concluded that plaintiffs are likely to prevail on the merits, we must now determine whether the balance of interim harm favors plaintiffs.

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[1]Health and Safety Code section 11366 provides: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance . . . which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison."

Section 11366.5, subdivision (b) states: "Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly allows the building, room, space, or enclosure to be fortified to suppress law enforcement entry in order to further the sale of any amount of cocaine, heroin, or phencyclidine and who obtains excessive profits from the use of the building, room, space, or enclosure shall be punished by imprisonment in the state prison for two, three, or four years."

Plaintiffs are likely to suffer irreparable injury if the LAPD continues to deploy the motorized battering ram without prior judicial overview. There is danger of injury to persons and to property in any use of the device. Moreover, plaintiffs may claim injury as taxpayers for the expenditure of funds by the LAPD to execute searches by unlawful methods. (See Arrieta v. Mahon (1982) 31 Cal.3d 381, 387; Blair v. Pitchess (1971) 5 Cal.3d 258, 269.)

Defendants, on the other hand, cannot claim they will suffer comparable injury if they are enjoined from using the ram without prior judicial authorization. In light of their already extensive administrative review of proposed uses, the additional requirement that the magistrate issuing the search warrant also authorize possible use of the ram should be a minimal burden. The ability of law enforcement to respond to rapidly changing circumstances at the scene of the search will remain unimpaired.

For the foregoing reasons, we hold that the trial court abused its discretion in denying plaintiffs' motion for a preliminary injunction. Let a peremptory writ of mandate issue directing respondent court to set aside its order of June 18, 1985, denying plaintiffs' motion for a preliminary injunction in Langford et al. v. Gates et al., and to enter an order enjoining the use by defendants of their motorized battering ram unless they obtain prior judicial authorization to do so in a search or arrest warrant, and unless exigent circumstances arise at the time of entry.

MOSK, J.

WE CONCUR:

BROUSSARD, J.
GRODIN, J.
REYNOSO, J.

LANGFORD v. SUPERIOR COURT
L.A. 32105

CONCURRING AND DISSENTING OPINION BY BIRD, C. J.

I write separately to express my views on the use by the police of a weapon of war in the neighborhoods of our citizens.

The facts warrant in-depth review because they highlight just how dangerous and unnecessary use of the "motorized battering ram" is in executing search or arrest warrants, even where the police confront specially fortified residences. They provide the basis for understanding why other police departments spurn its use, likening it to the use of an Uzi to shoot an illegally parked driver in the leg so he will be unable to escape getting a ticket. (Klein, *Rock Houses: Police Ram Opens Door to Debate,* L.A. Times (June 4, 1985) Home Ed., Metro Section, at p. 1.)

Turning to the record, there is basic agreement as to the following:

(1) The "motorized battering ram" is actually a military vehicle — a V-100 armored personnel carrier or tank — that has been specially equipped with a 14-foot horizontal steel battering ram capped with a rectangular steel plate.[1]

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[1]One newspaper report observes that the government uses the V-100 "to guard nuclear power plants and warhead factories." (Klein, *Rock Houses: Police Ram Opens Door to Debate,* L.A. Times, *supra,* at p. 1.) The report describes the vehicles as "look[ing] like little tanks with tires. They weigh 6.4 tons, [can] travel 62 miles an hour, can withstand small-arms fire and can climb a 30% grade." (*Ibid.*)

Although the Los Angeles Police Department (LAPD) prefers to use the euphemism "motorized battering ram" to refer to its specially

(2) When used to gain entry to a house, the V-100 is driven at approximately five miles per hour toward an exterior well. The ram is attached to the front of the vehicle. Once it hits and punches through the wall, the driver puts the vehicle in reverse and, as the ram is being withdrawn, the driver rakes it back and forth to create a hole approximately five feet in diameter through which the police may enter without having to crawl. These maneuvers take approximately six seconds.

(3) The department's usual but not invariable practice is to announce over a public address system that the LAPD is present to serve a search warrant immediately prior to using the V-100 to gain entry to a house. Insofar as the record reveals, however, the police do not ordinarily wait even a few seconds to determine whether the occupants of the house are willing to permit entry.

(4) The V-100 causes substantial damage to the target house. The force of impact is such as to cause wall studs at the area of impact to be displaced and thrown forcefully into the interior of the house. In addition, the V-100 causes significant damage to walls and ceilings located at some distance from the point of impact.

(5) The parties dispute the level of risk posed by use of the V-100 to the overall integrity of the target house and to the surrounding neighborhood. All agree, however, that there is a potential danger of structural collapse and/or rupture of electrical and gas utility lines and that a serious fire or explosion which could threaten the safety not only of the occupants of the target house but also of the surrounding neighborhood could result. In addition, the police have no way of knowing in advance whether

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equipped V-100, the department somewhat grudgingly admits that it would be "perceived to be a tank," which is what plaintiffs prefer to call it. Hereafter, the ram shall be referred to simply as the V-100, even though the "tank" description appears wholly accurate.

indivduals are standing or sitting directly in front of the V-100's intended point of impact and so might be struck by the ram itself or injured by falling wall studs, flying bits of masonry, or broken glass from nearby windows.

(6) At the time of the hearing on the preliminary injunction, the LAPD has used the V-100 four times in executing search warrants."[2] The first time was on February 6, 1985, against the Langford's rented home at 13037 Louvre Street. The LAPD concedes that this home was "fortified" in exactly the same manner as the house at 13031 Louvre Street, which the police were able successfully to enter and search — *without use of the V-100* — in June of 1984, before the occupants could destroy the cocaine in their possession. The LAPD further concedes that the decision to request use of the V-100 against 13037 Louvre Street was based solely on the visible fortifications and on the fact that the house was owned by

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[2]Although the LAPD gave its officers authority to use the V-100 on five other occasions during 1985, the did not employ it because of "changed circumstances" encountered at the scene of execution of these search warrants.

There is no indication in the record as to the nature of these "changed circumstances." However, the Los Angeles Times reports that, in one instance, the officers found a side door open and were able simply to walk in, while in another the house was blocked off by cars, thus preventing use of the V-100. (Klein, *The Ram at Rest: These Are Quiet Times for the LAPD's 'Battering Vehicle'*, L.A. Times (Feb. 10, 1986) Home Ed., Metro Section, at p. 1.) The V-100 is also useless, of course, against "rock houses" located in multi-story buildings above ground level.

one Jeff Bryant.[3] The police had no evidence that there were any weapons at 13037 Louvre Street.[4]

(7) The V-100 was next used on February 13, 1985, against an even more "fortified" house located as 233 West 111th Street. The police again concede that they were able successfully to enter and search this very same building — without use of the V-100 — in September of 1984. They further concede that the decision to request use of the V-100 on February 13th was based solely on the fact that the house was fortified and that, during the previous search, they had recovered two weapons.

(8) The third use of the V-100 occurred on March 22, 1985, against a house located at 11442 Wheeler Avenue. The police concede, yet again, that they were able successfully to enter and search this same house — without use of the V-100 — two months earlier, before the occupants were able to destroy the cocaine in their possession. Moreover, although a weapon was recovered in the earlier raid, there is no indication in the record that any attempt was made by the then current occupants to use it against the officers who executed the warrant. Finally, the only

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[3]Prior raids by conventional means on two other houses owned by Bryant — including 13031 Louvre Street — turned up weapons. The occupants of these houses did not, however, use these weapons to resist entry by the police. Moreover, the occupants were unsuccessful in their attempt to destroy the narcotics in their possession.

[4]Plaintiffs have repeatedly argued the fact no weapons were discovered in the course of the first three raids in which the ram was used as evidence that the LAPD's policies governing its use are constitutionally inadequate. However, it is well settled that "a search is not to be made legal by what it turns up. In law, it is good *or bad* when it starts and does not change character from its success [or failure]." (United States v. Di Re (1948) 332 U.S. 581, 595.) Accordingly, paragraphs (6) through (9) summarize only those facts known to the LAPD at the time of entry on each of the four occasions on which the ram was used. The facts learned subsequent to entry are irrelevant.

visible change in the fortifications during the two-month interval between the first and second searches was the addition of a chain link fence around the front of the house.

(9) The fourth use of the V-100 took place on April 26, 1985, against a "rock house" located on the ground floor of a brick building located at 4066 South Central Avenue. Insofar as the record reveals, the police had not previously served a search warrant at this location. Before entering the premises on April 26th, they were aware of the full extent of the interior fortifications, which were substantial. They had also been told that a shooting had occurred in the house the week previous, knew that both the operator and two guards were present, and knew that at least the operator and possibly the guards were armed or had weapons nearby.

(10) Although there is no direct evidence that use of the ram on this last occassion was wholly unnecessary, there is substantial circumstantial evidence which compels such conclusion. For example, during the four-month period from October 1984 to February 1985, members of the LAPD were able to enter and search 269 "rock houses" in which a total of 207 guns were seized — without use of the V-100 and apparently without injury to a single officer or the loss of a gram of evidence. Similarly, during the 3-day period from May 30 through June 1, 1985, LAPD officers entered and searched 13 (or 14) "rock houses" without resorting to use of the V-100 and without suffering injury, seizing approximately 10 weapons and 100 grams of cocaine.[5]

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[5]In December 1983, two LAPD officers were seriously injured by gunfire during execution of a search warrant on a "rock house." The police admit, however, that in narcotics cases the danger of such armed resistance is not limited to raids on "rock houses," and there is no evidence in this record which suggests that officers have in fact

(11) No one was physically injured during the four occasions on which the V-100 was used, although the three childern present in the Langford's house when it was rammed were so terrified by the experience that they were still having nightmares about it at the time of the hearing on the preliminary injunction, i.e., some four months later.

I.

I concur fully in the majority's conclusion that the LAPD's use of the V-100 may be regulated prospectively, through a carefully tailored injunction. The LAPD's contention that use of any particular weaponry may only be reviewed retrospectively on a case-by-case basis is frivolous.

First, it is well settled that "a pattern or practice of official conduct that is alleged to violate Fourth Amendment rights may be challenged by an aggrieved individual in a suit for declaratory or injunctive relief." (Illinois v. Gates (1983) ___ U.S. ___, ___ [103 S.Ct. 2317, 2346, fn. 19] (conc. opn. of White, J.), citing Zurcher v. Stanford Daily (1978) 436 U.S. 547 [action for declaratory relief under the Fourth Amendment]; accord, Lankford v. Gelston (4th Cir. 1966) 364 F.2d 197, 202 (en banc); White v. Davis (1975) 13 Cal.3d 757; Wirin v. Parker (1957) 48 Cal.2d 890; Wirin v. Horrall (1948) 85 Cal.App.2d 504-505 [actions for injunctive relief under the Fourth Amendment].)[6]

[6]The only difference between federal and California law in this regard concerns the showing a party must make in order to establish that he or she is "an aggrieved individual" and so entitled to bring such an action. California's requirements are less stringent than those imposed by federal law. (Compare Los Angeles v. Lyons (1983) ___ U.S. ___ [103 S.Ct. 1660] with White v. Davis, *supra*, 13 Cal.3d at pp. 762-765.)

Contrary to the LAPD's assertion, injunctions have issued to control the future use of particular weaponry by the police. (See, e.g., Wirin v. Parker, *supra*, 48 Cal.2d 890 [affirming issuance of an injunction to prohibit use of concealed microphones in the surveillance of private residences absent a search warrant].)

Second, in cases retrospectively challenging police practices, the courts routinely announce categorical rules that not only resolve the question whether the police acted properly in the case before the court but also define the circumstances, if any, in which such practices may be used in the future. Though technically not injunctions, such rules obviously have precisely the same effect. (See, e.g., Tennessee v. Garner (1985) ___ U.S. ___ [105 S.Ct. 1694]; Steagald v. United States (1981) 451 U.S. 204; Payton v. New York (1980) 445 U.S. 573; Delaware v. Prouse (1979) 440 U.S. 648.) Consider Tennessee v. Garner, *supra*, ___ U.S. ___ [105 S.Ct. 1694]. There, the Supreme Court confronted the issue whether police use of deadly force to apprehend a fleeing 15-year-old suspected felon violated the Fourth Amendment. The court concluded that it did and announced the rule that such force may be used only if the officer has probable cause to believe that the fleeing suspect poses a threat of serious physical harm, either to the officer or others. (*Id.*, at p. ___ [105 S.Ct. at p.l 1701].) The effect of that holding is to enjoin police across the nation from using deadly force to effecuate an arrest except in the circumstances sanctioned.

Thus, I must reject as frivolous the LAPD's contention that its use of the V-100 may only be reviewed retrospectively. Unlike the majority, however, I would not delegate review of its use to magistrates for a case-by-case deter-

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___ U.S. ___ [103 S.Ct. 1660] with White v. Davis, *supra*, 13 Cal.3d at pp. 762-765.)

mination. The V-100 should be used only in those cases where it is necessary to rescue an individual threatened with serious injury or death.

II.

The Fourth Amendment prohibits the indiscriminate use of force to gain entry to a house to execute an arrest or search. As the Supreme Court has explained, " 'reasonableness' is the overriding test of compliance with the Fourth Amendment. . . ." (Zurcher v. Stanford Daily, *supra,* 436 U.S. at p. 559.) Even searches "supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized" are unlawful if executed in an unreasonable manner. (*Id.,* at p. 560; accord Dalia v. United States (1979) 441 U.S. 238, 258; United States v. Lefkowitz (1932) 285 U.S. 452, 464-465; see also Ker v. California (1963) 374 U.S. 23, 38.) The same is true, of course, in the case of arrest. (See Tennessee v. Garner, *supra,* ____ U.S. at pp. ____-____ [105 S.Ct. 1694, 1699-1701].)

It is equally well settled that "reasonableness" requires the balancing of competing interests. On this point, the majority correctly conclude that, for the purpose of Fourth Amendment analysis, the question as to whether the LAPD may use the V-100 to effectuate a search or arrest must be judged by balancing its intrusion on Fourth Amendment interests against its promotion of legitimate governmental interests. (Tennessee v. Garner, *supra,* ____ U.S. at p. ____ [105 S.Ct at pp. 1699]; Delaware v. Prouse, *supra,* 440 U.S. at p. 654.)

It does not necessarily follow, however, that such balancing should be done on an ad hoc, case-by-case basis by a magistrate. To the contrary, as the Supreme Court and various legal scholars have observed, "if courts and law enforcement officials are to have workable rules, . . . this

balancing must in large part be done on a categorical basis" by the appellate courts. (Dunaway v. New York (1979) 442 U.S. 200, 219-220 (conc. opn. of White, J.); see also *id.*, at pp. 213-214; Illinois v. Lafayette (1983) ____ U.S. ____, ____ [103 S.Ct. 2605, 2610-2611]; see generally LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"* (1982) 43 U.Pitt. L.Rev. 307, 321; Amsterdam, *Perspectives on the Fourth Amendment* (1974) 58 Minn.L.Rev. 349, 375-377, 393-394.)

This latter alternative seems particularly appropriate here, since even under the balancing process which my colleagues would have a magistrate perform, an officer could not use the V-100 to gain entry to a target home.

The intrusiveness of this manner of entry is unparalleled. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " (Welsh v. Wisconsin (1984) 466 U.S. 740, 748; accord Payton v. New York (1980) 445 U.S. 573, 585; United States v. United States District Court (1972) 407 U.S. 297, 313; People v. Ramey (1976) 16 Cal.3d 263, 272-276.)

Intrustions into the home — even nonconsensual forcible entries — typically do not cause or risk physical injury to the occupants. Use of the V-100, however, risks precisely such injury, as well as several additional extraordinary harms. It risks not just serious physical harm to the occupants as it "smashes blindly through the walls of a residence" but also injury to the property and persons of those who live nearby (maj. opn., *ante*, at pp. , [typed maj. opn. at pp. 13, 15]). It causes greater damage to the target house than would any conventional means of forced entry. With it, the state proposes to severely damage, if not destroy, the home of a citizen not yet convicted of a criminal offense; to risk his health, if

not his life; and to risk harm to his neighbors. In light of these dangers, I must agree with my colleagues that use of the V-100 as the means of gaining entry to homes is presumptively unreasonable under the Fourth Amendment.

Against this presumptively unreasonable intrusion must be weighed society's interests in effective law enforcement. Here, the issue revolves around the police's ability to effectuate an arrest of a person suspected of a crime or to search for evidence of a crime. The law has long prohibited the use of force to enter a home — no matter how de minimis — except in a limited range of circumstances. These include a refusal of admittance following announcement by the police of their authority and purpose, and the existence of an emergency requiring an immediate, unannounced entry, such as the need to prevent loss or destruction of evidence, harm to officers or others, or escape. (Ker v. California, *supra*, 374 U.S. at pp. 38-41 (opn. of Clark, J.), *id.*, at pp. 54-60 (opn. of Brennan, J.); Miller v. United States (1958) 357 U.S. 301; People v. Dumas (1973) 9 Cal.3d 871, 877; People v. Bradley (1969) 1 Cal.3d 80, 86-89; People v. Gastelo (1967) 67 Cal.2d 586; see also Pen. Code, §§ 844, 845, 855, 1531.)

These settled rules necessarily restrict the scope of the inquiry here. All that need be evaluated is the strength of the state's interest in using the V-100 as a means of gaining entry to a "fortified" structure to carry out a search or arrest in the limited circumstances where a forcible entry is permitted.[7]

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[7]The LAPD concedes that there are fully effective, less dangerous means of gaining entry to all but "fortified" houses. It is only against such fortified premises as "rock houses" that they seek the right to use the V-100 in making an arrest or search.

Absent exigent circumstances, an occupant's mere refusal to admit the police into his or her home to conduct a lawful search or arrest can never justify use of the V-100. The police have available in their arsenal alternative means of entering even "fortified" structures.

These means are far less destructive and dangerous than an entry with the V-100.[8] Moreover, where there is no danger of destruction of evidence, or escape, or serious injury to officers or others, such means are equally as effective as the V-100, even though somewhat more time-consuming.

Under these circumstances, use of the V-100 would constitute a gratuitously destructive act which would be per se unreasonable under the Fourth Amendment. (United States v. Fernandez (N.D.Cal. 1976) 430 F.Supp. 794, 800; see also, e.g., People v. Vollheim (1978) 87 Cal.App.3d 538; United States v. Moreno (9th Cir. 1983) 701 F.2d 815, vacated and remanded on other grounds (1984) ____ U.S. ____ [105 S.Ct. 286].)

What, then, of a case involving the danger of destruction or loss of evidence? As a practical matter, this danger arises primarily in connection with lawful searches for evidence of drug and gambling offenses, because evidence of these crimes is or can be peculiarly amenable to ready destruction. Here, it is argued that effectiveness in conducting searches for evidence of drug crimes in "fortified" houses requires use of the V-100 because there is no less intrusive alternative that will allow the police to make a sufficiently rapid entry to prevent such destruction.

This argument is unpersuasive for two reasons. First, it lacks evidentiary support. Consider the record. The

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[8] The alternatives available to the police include hand-held sledgehammers and battering rams, Kerry cutting cables, and the use of ropes and a fork-lift to pull off bars or pull down doors.

LAPD has not come forward with even a single incident in which their attempt to execute a warrant on a "rock house" by conventional means resulted in a delay and subsequent destruction of evidence. In every reported incident, the suspects' attempt to destroy narcotics was frustrated by speedy police entry. The LAPD's conclusory statements that such destruction is *likely* to occur absent use of the V-100 are purely speculative.

Second, the Legislature has provided the police with a means of shutting down "rock houses" which is far less intrusive than their destruction by a V-100. (See Health & Saf. Code, §§ 11366, 11366.5, 11366.6. [9]) As a result, the effectiveness of law enforcement efforts to prevent the distribution of dangerous drugs is not dependent upon catching the dealers red-handed.

One of these statutes, section 11366, has been on the books for some time. It makes it a felony to "open[] or maintain[] any place for the purpose of unlawfully selling, giving away, or using" dangerous and unlawful drugs such as, for example, cocaine and heroin.

The other two statutes, sections 11366.5 and 11366.6, are of more recent origin. They were enacted by the Legislature, at the request of the LAPD, among others, in order to give the police a more effective means of eradicating the use of fortified buildings to distribute dangerous drugs than the V-100. [10] Section 11366.5, like section

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[9]All subsequent statutory references are to the Health and Safety Code unless otherwise indicated.

[10]These two statutes were enacted in 1985 pursuant to Assembly Bill No. 1862. (See Stats. 1985, ch. 1533, §§ 1, 2, at pp. - .) The committee reports discussing this bill describe the need for its passage as follows:

> "Proponents [including the LAPD] contend that fortification of homes, apartments, and other structures gives dealers time to

11366, is specifically directed at landlords who, desirous of obtaining "excessive profits" from their holdings, "knowingly" allow their properties "to be fortified to suppress law enforcement entry in order to further the sale of any amount of cocaine, heroin, or phencyclidine . . . ." (§ 11366.5, subd. (b).) Such individuals are punishable by imprisonment in the state prison for two, three, or four years. (*Ibid.*)

Section 11366.6, on the other hand, is specifically directed at the dealer-on-the-scene, who "utilizes a building, room, space, or enclosure specifically designed to suppress law enforcement entry in order to sell or possess for sale any amount of cocaine, heroin, or phencyclidine . . . ." Such conduct is punishable by imprisonment in the state prison for three, four, or five years for each violation of the statute, a punishment equal to or greater than they would receive if they were found in possession of a saleable quantity of these narcotics. (Compare § 11366.6, subd. (b) with §§ 11351, 11352, 11378.5.)

Aside from the deterrent effect such statutes can reasonably be expected to have on the proliferation of "rock houses," it is significant that a conviction of these offenses is in no way dependent upon the police catching a dealer or landlord on the premises with narcotics in hand. Proof of possession is not necessary to establish a viola-

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destroy drugs, and valuable evidence and that *use of battering rams and 'other extreme measures' to force entry have thus far been ineffective and highly controversial. . . .*"

(Sen. Com. Rep. on Assem. Bill No. 1862, Sen. Rules Com. (1985) at p. 2 [emphasis added]; Assem. Com. Rep. on Assem. Bill No. 1862, Com. on Public Safety (1985) at p. 1.)

These committee reports are appropriate sources of legislative intent. (See, e.g., People v. Weidert (1985) 39 Cal.3d 836, 847, fn. 9; Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 219, and dis. opn. of Mosk, J., at p. 221; In re Marriage of Brigden (1978) 80 Cal.App.3d 380, 391.)

tion of section 11366 (People v. Cannon (1957) 148 Cal.App.2d 163) nor, by parity of reasoning, is it necessary under either section 11366.5 or section 11366.6.[11]

As a result, even in those cases where evidence might be destroyed before police gained entry to a "fortified" structure by conventional means, the people, through their elected representatives, have demonstrated that measures short of the destruction are available to quell such criminal efforts to avoid detection and punishment. The Legislature's prompt and highly commendable action in passing sections 11366.5 and 11366.6 ensures that the community's interest in preventing the distribution of these dangerous drugs cannot be frustrated by narcotics dealers who hide behind even layer-upon-layer of steel bars and doors. With the enactment of these statutes, police resort to weapons of war such as the V-100 are no longer even arguably necessary to stop narcotics dealers in their tracks.

Similar alternatives are available to the police vis-a-vis purveyors of unlawful games of chance, evidence of which is readily amenable to destruction, a class that seemingly would encompass only bookmaking. (See Pen. Code, §§ 337a, 11225-11230.)[12] And, there is no reason to doubt that, should use of "fortified" houses for the distribution

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[11]It is, perhaps, worthy of note that the state was able successfully to convict, under section 11366.5, the owner of three of the four "rock houses" against which the V-100 was used, even though the LAPD apparently " 'never caught him at the houses or with any drugs.' " (Quinn, *Pacoima Cocaine Ring: 'Rock House' Landlord Gets Prison Sentence*, L.A. Times (Mar. 14, 1986) Home Ed., Metro Section, at p. 2.)

[12]Since gambling offenses do not typically involve violence and are classified only as misdemeanors, it cannot seriously be contended that their commission warrants use of such a dangerous and destructive weapon as the V-100. The "seriousness of the underlying criminal

of illegal drugs other than heroin, cocaine, and phencyclidine, become a problem, the Legislature will act promptly to extend the reach of sections 11366.5 and 11366.6 to deter and punish such conduct.[13] As a result, I am compelled to conclude that the use of the V-100 is neither sufficiently productive nor necessary to outweigh its intrusion upon Fourth Amendment interests in cases involving a danger of destruction or loss of evidence.

The use of the V-100 in cases involving a "danger of escape" is equally unwise. Effectiveness in preventing escapes scarcely seems likely to be materially improved by using the V-100. On this, my colleagues apparently agree. They, too, would not allow the use of the V-100 in such circumstances, even if authorized by a magistrate. The danger of escape is not one of the exigencies which they hold would permit its use. (See maj. opn., *ante*, at p. 32.)

This brings us to the final category of cases in which use of force is ever allowable in gaining entry to a home — the threat of serious injury to officers or others. The LAPD insists that effectiveness in making arrests and in conducting searches at "fortified" dwellings requires use of the V-100, where there is a significant danger of armed resistance. We are told that the presence of "fortifications" increases the likelihood that the police will face such resistance if entry is attempted via conventional means.

No evidence has been offered to support this contention. However, even if we were to assume its truth, this argument fails. The simple fact is that there is always an

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[13]In the interim, use of such premises to obstruct the police would be punishable under Penal Code section 148 which proscribes willful resistance, delay, or obstruction of a peace officer in the discharge or attempted discharge of his duties.

alternative available to the police in the face of a threat that they will be fired upon if they attempt entry by force. They can encircle the target house, announce their authority and purpose, and simply wait out the suspects inside. Eventually, the suspects must surrender.

Alternatively, the police can place the target house under surveillance and wait to serve their search or arrest warrant until the suspects attempt to leave or inadvertently make a point of entry possible. (See, *ante,* fn. 3, at p. 35.)

Such tactics are not new. Nor are they dramatic. But history attests to their effectiveness. Moreover, these are safe alternatives.

The V-100, with all its power, is unable to climb stairs and it will not fit into elevators. Its use against a "fortified" house blocked off by the vehicles of innocent citizens is also not feasible. (See, *ante,* fn. 3, at p. 35.) Given these facts, there seems little reason to endorse its use against a structure fortuitously accessible.

I do not minimize the possibility of attack by the occupants of a "fortified" house on police. However, the citizens of Philadelphia who lost their homes on May 13, 1985, when the police bombed a fortified house there would no doubt have preferred patience to counterattack, especially given the innocent young children who died in the blaze that followed. The events in Philadelphia serve as a reminder that we should be extraordinarily cautious about authorizing use of any weapon of war in our

residential neighborhoods. This is especially true if the weapon is not essential to effective law enforcement.[14]

In sum, the only circumstance in which use of the V-100 is even arguably justifiable is for rescue, that is, to save the life of a hostage who is unquestionably in danger. For that reason, I would hold that plaintiffs are entitled to a preliminary injunction prohibiting its use in other circumstances.

BIRD, C.J.

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[14]On this point, it is interesting to note that the Los Angeles County Sheriff's Department has apparently developed a motorized battering ram that is as effective as the V-100 but involves none of the dangers which the V-100 poses. (Klein, *A Ram at Rest: These are Quiet Times for LAPD's 'Battering' Vehicle*, L.A. Times, *supra*, at p. 1.)

LANGFORD v. THE SUPERIOR COURT OF LOS ANGELES COUNTY
L.A. 32105

CONCURRING AND DISSENTING OPINION BY LUCAS, J.

I concur with the majority opinion to the extent it upholds the trial court's refusal to issue a preliminary injunction precluding police use of "flashbangs" during drug searches. I dissent, however, to the majority's holding that henceforth law enforcement officers must obtain prior judicial authorization before using the V-100 motorized battering ram during such searches. In my view, the courts should neither interfere with, nor restrain the use of, particular law enforcement methods or techniques which play a legitimate role in fighting crime, so long as no unreasonable risk of danger to human life is involved.

The record indicates a legitimate use exists for the V-100, namely, to break into fortified, steel-reinforced houses where drugs are sold or manufactured, for purposes of executing search or arrest warrants. The record also indicates that in many situations, the need for action is *immediate* and any delay beyond obtaining the requisite departmental approval might result in the loss or destruction of incriminating evidence or contraband. (See Parsley v. Superior Court (1973) 9 Cal.3d 934, 940.)

The majority voices a concern about the potential dangers to person or property posed by the V-100 ram. But most police work is inherently dangerous, frequently entailing high-speed chases, gunfire and explosives. Yet, obviously we do not require prior judicial authorization in those instances; the existence of prior administrative guidelines and approval procedures, and the availability of civil damage actions is deemed adequate protection for our citizens. No compelling reason exists for singling out

the V-100 ram for special treatment; the record indicates that the ram has been used on several prior occasions without inflicting any serious personal injury.

According to the record, elaborate guidelines exist for obtaining administrative approval before using the ram. These guidelines require the officers to take into consideration such factors as the fortified nature of the house under scrutiny, the existence and viability of alternative entries, the expected resistance to a forced entry, and the risk of harm to the entering officers, the suspects and their neighbors. The majority's imposition of yet another layer of review-and-approval procedure, namely, submission of the issue to a magistrate, is both unnecessary and unwise.

The controlling principal is quoted by the majority itself: "[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant — subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" (Dalia v. United States (1978) 441 U.S. 238, 257, fn. omitted.) In my view, given the fact that the V-100 ram is only used to enter fortified houses where narcotics transactions occur, and that careful administrative scrutiny is required before each use, no Fourth Amendment violation can arise here.

I would affirm the judgment denying the preliminary injunction.

LUCAS, J.

I CONCUR:
PANELLI, J.

LANGFORD et. al. v. SUPERIOR COURT

L.A. 32105

COUNSEL FOR THE PARTIES:

FOR PETITIONERS:
Joan Howarth, Esq.
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

FOR REAL PARTY IN INTEREST:
City Attorney — Los Angeles
1800 City Hall — East
200 North Main Street
Los Angeles, CA 90012
(213) 485-6494

TRIAL COURT & NUMBER:
LOS ANGELES SUPERIOR COURT
No. C 535-405

TRIAL JUDGE:
Hon. Irving Shimer

APPENDIX B

ORDER DUE
March 3, 1987

ORDER DENYING REHEARING

LA No. 32105

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

LANGFORD, Et al.
Petitioners

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondents
GATES, Et al.,
Real Parties in Interest

Real parties in Interest's petition for rehearing DENIED.

SUPREME COURT
F I L E D
FEB 26 1987
Laurence P. Gill, Clerk

DEPUTY

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 26, 1987, I served the within PETITION FOR A WRIT OF CERTIORARI in re: "Daryl Gates vs Dolores Langford" in the United States Supreme Court, October Term 1986 No. . . . .

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Joan Howarth, Esq.
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

All Parties Required To Be Served Have Been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 26, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DARYL GATES, et al.,
Petitioners,
vs.
DOLORES LANGFORD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

JOAN W. HOWARTH
Counsel of Record
MARK D. ROSENBAUM
PAUL L. HOFFMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720
Counsel for Respondents

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

27pp

QUESTION PRESENTED

Whether the reasonably foreseeable risk of serious injury from driving a fourteen foot steel battering ram mounted on a military tank through a wall into the interior of an occupied residence requires police to obtain specific judicial authorization for that method of entry prior to using it to execute a warrant.

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NO. 86-1932

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DARYL GATES, et al.,

Petitioners,

vs.

DOLORES LANGFORD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Dolores Langford, et al., respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioners seek review of the California Supreme Court's opinion in this case, which is reported as Langford

v. Superior Court, 43 Cal.3d 21, 233 Cal.Rptr. 387 (1987). A copy of that opinion is attached to the petition as Appendix A, 1a-34a. Another lower court decision in this case relevant to the petition is Langford v. Gates, reported at 610 F.Supp. 120 (C.D. Cal. 1985).

JURISDICTION

Jurisdiction is not proper for three separate reasons. First, the opinion below rests upon independent and adequate state grounds. See Michigan v. Long, 463 U.S. 1032, 1038-1044 (1983). Second, the "final judgment" requirement of 28 U.S.C. § 1257 has not been met in that the opinion below resulted simply in provisional relief, a preliminary injunction. Finally, this California taxpayer action does not satisfy the threshold case or controversy requirement for federal court

jurisdiction of Article III of the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2 in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more states;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress

shall make.

California Constitution, Art. I, § 13: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

California Code of Civil Procedure, § 526a:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officers thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for improvements or public utilities.

An action brought pursuant to this section to enjoin a public improve-

ment project shall take special precedence over all civil matters on the calendar is granted by law.

California Penal Code, § 1531:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

California Penal Code § 1533:

Upon a showing of good cause, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the case and facts as set forth in the California Supreme Court opinion, with the following additions.

Three of the plaintiffs in this action, Dolores Langford and her sons Eddie, then

four, and Dyvon, then nine, were visiting at the home of a neighborhood friend when that house became the first target of the Los Angeles Police Department's "motorized battering ram." The "motorized battering ram" is a surplus military armored personnel carrier, or tank, specially equipped by petitioners with a fourteen-foot steel battering ram fronted by a rectangular steel plate.

Petitioners used the tank-driven battering ram for the first time on February 6, 1985 at 7:30 p.m. The ram ripped through a room where Eddie, Dyvon, and another child, age five, had been playing until 7:25, when their mothers had called them into the kitchen for ice cream.[1]

---

[1] The record before the California Supreme Court contained substantial documentation of this event, including a KCBS videotape of the entry (Ex. A to the

Although petitioners continue to describe that home as a fortified rock house (e.g., Pet. 3), no weapons were in the home and no criminal charges were filed as a result of that raid. The "fortifications" on the house, bars on the windows and a heavily screened front door and porch, were on the home at the time that the tenants moved in. See Declaration of Linda Johnson, in Ex. 3 to Pet. for Writ of Mandate. Although the basis for the search warrant was an informant's report that he had bought $50.00 worth of cocaine from an adult Black male in that location, there were

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Motion for a Prelim. Inj.), Los Angeles Times photographs of the tank-driven battering ram (Ex. M & N), photographs of the damage to the house (Ex. C through L), and declarations (within Ex. 3 to Pet. for Writ of Mandate) from Dolores Langford, her son Dyvon, and Linda Johnson, the other adult occupant of the home.

no males over the age of nine in the home at the time that the tank-driven battering ram was used. See Motion for Prelim. Inj. at 7-10, Ex. 2 to Pet. for Writ of Mandate.

Although petitioners submitted affidavits that the driver was trained not to exceed five miles per hour when driving into the house, the videotape of the battering ram indicates that the tank accelerated well beyond that limit at the moment of impact. See Exh. A to Motion for Prelim. Inj., in Ex. 4 to Pet. for Writ of Mandate.

The record below demonstrates that petitioners presented no method to avoid hitting anyone inside the home who happened to be in the path of the battering ram. See Ex. 7 to Pet. for Writ of Mandate at 9-11. To the contrary, petitioners acknowledged that "the

use of force directed against a building will always create some risk that a person inside may suffer injury because of where he or she happens to be...." Defendant's Opp. to Motion for Prelim. Inj. at 37, Ex. 5 to Pet. for Writ of Mandate.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The California Supreme Court's Decision Rests Upon Independent and Adequate State Grounds.

Petitioners' contention that the opinion below does not rest upon independent and adequate state grounds under the rule of Michigan v. Long, supra, 463 U.S. at 1041-1044 is incorrect. Petitioners describe as "oblique" (Pet. 5 n.1) what was in fact the specific holding of the court below -- set forth clearly at the very outset of the opinion:

> The unregulated use of the motorized battering ram, but not the flash-bangs, poses a significant and unusual threat to property and public safety that may, unless subject to judicial scrutiny, contravene the proscription against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution.

Langford v. Superior Court, Pet. App. 1a (emphasis added).

The explicit reliance upon the California Constitution in the holding of the opinion is followed and built upon by extensive analysis of California law. Petitioners' jurisdictional argument (Pet. 5 n.1) omits any reference to the California statutes (including California Penal Code § 1533 restricting nighttime service and § 1531 controlling knock and notice) and most of the case authority (including Parsley v. Superior Court (1973) 9 Cal.3d 934, People v. Dumas

(1973) 9 Cal.3d 871, People v. Gastelo (1967) 67 Cal.2d 586 and People v. Vollheim (1978) 87 Cal.App.3d 538) used by the court below as the search and seizure jurisprudence forming the basis for its opinion. See Pet. App. 9a-12a.

Further, the decision below rests on California civil procedure regarding the availability of provisional injunctive relief generally (App. 6a-7a) and specifically pursuant to California Code of Civil Procedure § 526a, which provides standing for taxpayers to enjoin illegal use of funds. Pet. App. 7a, 14a.[2]

---

[2]Lack of Article III jurisdiction because of the taxpayer standing for this injunction is discussed infra at 12-15.

In addition, the fact that the opinion below reversed the denial of a preliminary injunction means that the instant case does not present a "final judgment" as required for this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257. An order granting a preliminary injunction is not deemed final unless the injunction concludes the case. E.g.,

Petitioners are correct that two federal cases, Johnson v. United States, 333 U.S. 10 (1948) and Dalia v. United States, 441 U.S. 238 (1979), were cited in the opinion. However, Johnson v. United States, supra, was simply the source of Justice Jackson's classic phrase "officer engaged in the often competitive enterprise of ferreting out crime." Pet. App. 9a. Dalia v. United States, supra, although vigorously urged upon the California court (and now this Court) by petitioners, was discussed and found not to apply. Pet. App. 9a-10a.

As is clear from the opinion below, the

Musser v. Sheppard, 299 U.S. 513 (1936); Williams v. Quill, 303 U.S. 621 (1938). The limited exceptions to this rule (see, e.g. Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 n. (1971); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 312-313 n.5 (1968) were based on a heightened concern for irreclaimable First Amendment rights not present here.

preliminary injunction ordered as a result of this California Supreme Court opinion would be precisely the same even if based solely on California law. In short, a grant of certiorari in this case would push this Court's certiorari jurisdiction well beyond the limits of Michigan v. Long, supra, and needlessly entangle this Court in questions of California search and seizure jurisprudence and civil procedure for the purpose of creating what would be simply an advisory opinion.

2. The Injunction Was Granted Below As A State Taxpayer Action That Does Not Present A Case Or Controversy As Required For Federal Court Jurisdiction.

This Court has no jurisdiction over this matter because it does not meet the "threshold" case or controversy requirement, City of Los Angeles v. Lyons, 461

U.S. 95, 101 (1983), of Article III of the United States Constitution. The California Supreme Court granted plaintiffs injunctive relief as taxpayers pursuant to California Code of Civil Procedure section 526a, which invites taxpayers to use California courts to prevent or restrain illegal expenditures by governmental entities. Pet. App. 2a, 14a. California Code of Civil Procedure section 526a provides much broader standing in California courts than the relatively strict constraints that Article III imposes on federal courts. Compare White v. Davis, 13 Cal. 3d 757 (1975) with City of Los Angeles v. Lyons, supra, 461 U.S. 95. Under the well-settled authority of Doremus v. Board of Education, 342 U.S. 429, 434-435 (1952), and Flast v. Cohen, 392 U.S. 83, 102-03 (1968), there can be no question that

petitioners are asking this Court to assert jurisdiction over a matter outside the jurisdiction of any federal court.

Not bound by Article III, California courts have accepted the invitation of Doremus v. Board of Education, supra, 342 U.S. at 434, to provide taxpayer standing to redress constitutional violations. The opinion below is simply the latest in a long line of such California taxpayer actions. E.g., Van Atta v. Scott, 27 Cal.3d 424 (1980); White v. Davis, 13 Cal.3d 757 (1975); Blair v. Pitchess, 5 Cal.3d 258 (1971); Wirin v. Parker, 48 Cal.2d 890 (1957).

In fact, in Langford v. Gates, 610 F. Supp. 120 (C.D. Cal. 1985), a federal district court has already recognized that the injunctive claims in this case do not constitute a "case or controversy" within the meaning of Article III. In

the early stages of this litigation petitioners attempted to remove this action to federal court and moved to dismiss the injunctive claims for lack of federal court jurisdiction. See Langford v. Gates, supra, 610 F.Supp. at 121. Petitioners themselves asserted, respondents conceded, and the court held as "undisputed" (id. at 121) that the injunctive claims did not constitute a case or controversy and were therefore not within the jurisdiction of a federal court. Id. at 121-122. Unfortunately for petitioners, the case or controversy limitations of Article III cannot be turned on and off for their convenience. Article III does not permit this Court to take jurisdiction over this case.

3. The Requirement Of Prior Judicial Authorization Is The Established Solution For Unusually Dangerous Search Techniques.

The principle that judicial authorization is required prior to especially risky or intrusive searches is well-established within California and federal search and seizure jurisprudence. See, e.g., Winston v. Lee, 470 U.S. 753 (1985), People v. Scott, 21 Cal. 3d 284 (1978), and California Penal Code, section 1533. The California Supreme Court decision below simply applies this principle to a new set of circumstances, that the Los Angeles Police Department wants to use a dangerous tank-driven battering ram to execute certain search warrants.

The record below demonstrated to the California Supreme Court that the motorized battering ram as used by

petitioners created a "significant and unusual threat to property and public safety." Pet. App. 1a. The California Supreme Court described some of the risks:

> "[Defendants] concede the potential danger from collapse of building walls and ceilings or through rupture of utility lines. Fire from damaged electrical wires or explosion from gas leaking from broken gas pipes could threaten the safety not only of occupants, but of entire neighborhoods." Pet. App. 8a.

The court's recognition of a requirement for prior judicial authorization was based on the record of "reasonably foreseeable" (Pet. App. 9a) risk of "incidental injury to human beings" (id.) from petitioners' use of their tank-driven battering ram. The specific technique at issue--using a military tank to drive a steel pole and plate into the interior of an occupied residence in order to conduct a search -- is sensa-

tional and unprecedented; however, the sensible and well-reasoned judicial authorization limitation imposed by the California Supreme Court is well within the mainstream of search and seizure analysis.

Petitioners' complaint that the requirement of obtaining a warrant prior to using their motorized battering ram will unreasonably inhibit their ability to respond to crime quickly and effectively (Pet. 6-7) was soundly rejected by the Court below on the basis of petitioners' own affidavits. Petitioners submitted detailed affidavits that described a careful, deliberate review process that was conducted within two different divisions and that climbed carefully through the chain of command to

the assistant chief level.[3] On the basis of this record the court below properly and easily concluded:

> "[I]n light of the deliberate, often prolonged, planning that the LAPD undertakes before it deploys the device, prior judicial review of its proposed use of the ram against suspected rock houses is unlikely to obstruct effective law enforcement." Pet. App. 1a-2a (emphasis added).

Petitioners' argument -- that they and other police agencies should have

---

[3] Petitioners submitted affidavits describing a review process that begins with a "careful and detailed study" by narcotics officers, is then reviewed by the "commander of the narcotics division," and then taken to SWAT officers for an independent inspection of all available options. The results of that new study are then scrutinized by the "Captain in charge of SWAT," who then takes them for an independent review by the Commander of the Metropolitan Division, who goes finally to the Assistant Chief for the ultimate decision. See, e.g., Answer to Petition for Writ of Mandate at 19-20, Declarations of Captain Robert Blanchard, Captain John Higgins, Commander George Morrison, and Assistant Chief Marvin Iannone in Opp. to Motion for Prelim. Inj. (Ex. 6 to Pet. for Writ of Mandate).

unfettered discretion to use whatever tactics they choose, however dangerous--finds no support in either California or federal law. Dalia v. United States, supra, 441 U.S. 238, the single case cited to this Court by petitioners to support their position, was correctly distinguished by the court below. Pet. App. 9a-10a. In fact, no court has ever held Dalia to mean what petitioners want it to mean.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

JOAN W. HOWARTH
Counsel of Record
PAUL L. HOFFMAN
MARK ROSENBAUM
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

Counsel for Respondents

June 25, 1987

Supreme Court, U.S.
FILED
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CLERK

(3)

NO. 86-1932

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DARYL GATES, et al.

v.

DOLORES LANGFORD, et al.

BRIEF OF AMICUS CURIAE, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, CALIFORNIA, AND JOINING CITY AND COUNTY LAW ENFORCEMENT OFFICIALS OF CALIFORNIA, IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

IRA REINER
District Attorney of
Los Angeles County

HARRY B. SONDHEIM, Head Deputy
Appellate Division
Counsel of Record

DIRK L. HUDSON
Deputy District Attorney
849 So. Broadway, 11th Floor
Los Angeles, California 90014-3570
Telephone: (213) 974-5921

Attorneys for Amicus Curiae

2 cpy

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NO. 86-1932

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DARYL GATES, et al.

v.

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On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, CALIFORNIA, AND OTHER JOINING CITY AND COUNTY LAW ENFORCEMENT OFFICIALS OF CALIFORNIA, IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

BRIEF OF AMICUS CURIAE

Pursuant to Rule 36, subdivision (1) of the Rules of the United States Supreme Court, written consent of the parties having been obtained and accompanying the brief (to be filed concurrently therewith), Amicus Curiae, Ira Reiner, District

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Attorney of Los Angeles County submits this brief in support of the petition for writ of certiorari.

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office prosecutes felony narcotics and dangerous drug cases predicated on seizures of contraband by the Los Angeles City Police Department and the Los Angeles County Sheriff's Department. Each of these departments is in possession of its own respective type of motorized battering ram intended for use against an increasingly prevalent type of fortified structure which is specially designed to frustrate the execution of search warrants, as well as to provide anonymity to drug dealers, i.e. the "rock house." The decision of the California

Supreme Court sought to be reviewed herein inflexibly subjects both of these types of rams (despite differences in these battering rams which were conceded to be significant by the then Chief Justice of that Court) to the same rigid requirements of prior judicial authorization before deployment in a particular case without regard to rapidly changing circumstances. It follows that the opinion below directly affects the successful prosecution of cases within the jurisdiction of amicus curiae, the District Attorney of Los Angeles County.

Furthermore, not only Los Angeles County, but the entire State of California is impacted by the decision of the Court below. The law enforcement agencies (sheriffs and police chiefs) joining this brief as amici curiae, being charged with

the duty of protecting the public against criminal narcotics and drug traffickers, and facing increasingly ingenious devices (such as rock houses) to frustrate their abilities to carry out their responsibilities, have an obvious interest in preserving their historic discretion in the selection of appropriate tactical means for the effective execution of search warrants. (See e.g. affidavits attached hereto as Appendix B, post.)

SUMMARY OF ARGUMENT

By a process of judicial legislation, the California Supreme Court has interpolated into the warrant clause of the Fourth Amendment an additional element requiring prior judicial authorization of the means of execution of search warrants where those means are deemed, a priori, "inherently dangerous," over-

extensively including by definition all motorized battering rams regardless of type. This novel interpretation represents a sweeping revision of the Fourth Amendment, unfounded either in its plain terms, or historic purpose, contrary to its construction by this Court, and fundamentally restricting the ability of law enforcement to respond flexibly to changing circumstances in confronting the increasing use of "rock houses" by those who traffic in illegal drugs, a national epidemic.

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ARGUMENT

THE CALIFORNIA SUPREME COURT ERRONEOUSLY UNDERTOOK A SWEEPING REVISION OF THE WARRANT CLAUSE OF THE FOURTH AMENDMENT BY ADDING TO ITS REQUIREMENTS PRIOR JUDICIAL AUTHORIZATION OF THE MEANS OF EXECUTION WHERE SUCH MEANS CONSIST OF THE USE OF A "MOTORIZED BATTERING RAM" (REGARDLESS OF TYPE) OR OTHER DEVICE DEEMED "INHERENTLY DANGEROUS"

The instant case presents an issue of constitutional construction. Fundamentally, "when the text of a constitutional provision is not ambiguous, the courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." (Lake County v. Rollins 130 U.S. 662, 670 [1889].) This applies "whatever might be the views entertained

of its expediency." (Ogden v. Saunders 25 U.S. 212, 303 [1827].) Accordingly, "'where the intention is clear there is no room for construction and no excuse for interpolation or addition.'" (United States v. Sprague 282 U.S. 716, 731-732 [1921] quoted in Reid v. Covert 354 U.S. 1, 8 [1957].)

The terms of the Warrant Clause of the Fourth Amendment "are precise and clear." (Stanford v. Texas 379 U.S. 476, 481 [1965].) On "the face of the Amendment" (Zurcher v. Stanford Daily 436 U.S. 547, 554 [1978]), the clause merely provides that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U. S. Const., Fourth Amend.) This Court "has

interpreted [this clause] to require only three things," i.e. (1) issuance by neutral disinterested magistrate, (2) probable cause that the evidence sought will aid in apprehension or conviction for a particular offense, and (3) a particular description of things to be seized and place to be searched. (See Dalia v. United States 441 U.S. 238, 255 [1979] [does not also require prior justification of covert entry as a potential method of installing judicially-authorized bugging equipment], see also Zurcher, supra, 436 U.S. at 554 [does not also require probable cause to believe that third party owner of place to be searched is implicated in the crime].) 1/

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1. This comports with the fact that the primary purpose of the Fourth Amendment was to put an end to the general warrants and writs of assistance under

(continued...)

This Court in Dalia went on to point out that:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officer to determine the details of how best to proceed with the performance of a search authorized by warrant--subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

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1. (...continued)
which officers of the Crown had been empowered to conduct general searches and seizures. (See Warden v. Hayden 387 U.S. 294, 301 [1967].) On the other hand, "[s]uspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would had he complied with [statutory knock-notice requirements]" (Ker v. California 374 U.S. 23, 39 [1963]). A fortiori, the same would apply to other niceties, neither of constitutional, statutory, nor of common law origin.

(Supra, 441 U.S. at 257.)

As to this last qualification, the Dalia court explained that "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." (Id. 441 U.S. at 258.) That this principle applies also to methods of forced entry (e.g. the motorized battering ram) is made clear in footnote 19 of the Dalia opinion where this Court states:

> For example, courts have upheld the use of forceful breaking and entering where necessary to effect a warranted search, even though the warrant gave no indication that force had been contemplated. See, e.g., United States v. Gerbato, 474 F2d 40, 41 (CA3), cert. denied, 414 U.S. 864, 94 S.Ct. 39, 38 L.Ed.2d 84 (1973). To be sure, often it is impossible to anticipate when these actions will be necessary. See Note, Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements, 47 Ford.L.Rev. 203, 214 (1978). Nothing in the decisions of this Court,

> however, indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary. See 2 W. LaFave, Search and Seizure 140 (1978). (Ibid. at fn 19.)

Despite this Court's exegesis of the "three requirements" imposed on search warrants by the Fourth Amendment (Id. 441 U.S. at 257), the California Supreme Court construed "Fourth Amendment protection" (Langford v. Superior Court 43 Cal.3d 21, 31, 233 Cal.Rptr. 387, 395, 729 P.2d 822, 829 [1987]) so as to require that "[b]efore authorizing potential use of the battering ram, the magistrate finding probable cause for the underlying search must apply an additional balancing test to

determine whether use of the device is appropriate." (Ibid.) 2/

This interpolation into the Warrant Clause of an "additional" requirement violates this Court's canons of constitutional construction (United States v. Sprague, supra, 282 U.S. at 731-732) and directly contradicts this Court's substan-

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2. In a earlier decision, the California Supreme Court itself had observed that:

> "Inasmuch as the Legislature has provided no authority for inserting directions in warrants excusing compliance with statutory announcement requirements and has in fact impliedly barred such a procedure, the courts are without power to institute a practice of issuing such warrants unless prior judicial authorization of noncompliance is constitutionally mandated. We conclude that it is not." (Parsley v. Superior Court [1973] 9 Cal.3d 934, 939, 109 Cal.Rptr. 563, 566, 513 P.2d 611, 614.)

tive interpretation of the Fourth Amendment (Dalia, supra, 441 U.S. at 255-257), resulting in a "sweeping revision of the Fourth Amendment," itself. (Zurcher, supra, 436 U.S. at 554.)

Contrary to the California Supreme Court, discretionary deployment of the ram to execute search warrants without specific prior judicial authorization is neither "presumptively unreasonable" nor in violation of basic constitutional guarantees. (Contrast Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 827-828 with Ker v. California, supra, 374 U.S. at 39, inter alia, quoting People v. Maddox 46 Cal.2d 301, 306, 294 P.2d 6, 9 [1956] [unannounced entry]; Dalia, supra, 441 U.S. at 257 [covert entry to install pre-authorized bugging device].)

Any such required prior authorization would not only "extend the Warrant Clause to the extreme," but also be "unnecessary" given the availability of (1) "later judicial review" of the case (Dalia, supra, 441 U.S. at 258) and (2) state legislative review of the general problem (Ker, supra, 374 U.S. at 34, cf. Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 827-828, referring to Penal Code section 1533 [magistrate's discretion to permit night-time service]), preserving the function of the Constitution as a general outline of powers granted, limited, and reserved. (See M'Culloch v. Maryland, 17 U.S. 316, 404-407 [1819].)

It must be recognized that "conditions and circumstances vary just as do investigative and enforcement techniques."

(Ker, supra, 379 U.S. at 34.) As Justice (now Chief Justice) Lucas pointed out below in his dissent, "[t]he record also indicates that in many situations, the need for action is immediate and any delay beyond obtaining the requisite departmental approval might result in the loss or destruction of incriminating evidence or contraband." (Langford, supra, 43 Cal.3d at 44, 233 Cal.Rptr. at 403, 729 P.2d at 838, Lucas, J., dissenting, citing Parsley v. Superior Court, supra, 9 Cal.3d at 940, 109 Cal.Rptr. at 563, 513 P.2d at 611 ["[f]acts existing at the time of obtaining a warrant may no longer exist at the time of entry"].)

The foregoing considerations indicate the inappropriateness of requiring prior judicial authorization as to tools of forced entry into structures which might

turn out to be fortified or which can be potentially fortified at the last minute so as to delay execution of a previously acquired search warrant. Before-the-fact judicial review would necessarily extend to a range of entry devices which might be deemed to be "inherently dangerous" and to a range of potential field situations since an ordinary structure might be later discovered to have hidden fortifications or to be newly fortified at the time of execution. Such uncertainty would needlessly encumber the process of obtaining search warrants whenever a potential "rock house" is suspected.

The weakness of the California Supreme Court's position is reflected in the fact that its requirement of prior judicial authorization is made <u>a priori</u> applicable to "the motorized battering

ram" as such, without differentiation as to type (see Langford, supra, 43 Cal.3d at 24, 28, 31, 32, 233 Cal.Rptr. at 389, at 392-395, 729 P.2d at 824, 826,829, 830). Yet, then Chief Justice Bird in her concurring opinion found it "interesting to note that the Los Angeles County Sheriff's Department has apparently developed a motorized battering ram that is as effective as the V-100 but involves none of the dangers which the V-100 poses." (Id. 43 Cal.3d at 43, fn. 14, 233 Cal.Rptr. at 403, fn. 14, 729 P.2d at 837, fn. 14, Bird, C. J., concurring.) 3/

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3. The California Supreme Court concedes that "defendants dispute the level of risk posed by the V-100 battering ram" and refers instead to a speculative "potential" danger. (Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 826.) That court also conceded that in denying injunctive relief, the trier of fact "agreed with defendants," finding "insufficient data" of misuse.

(continued...)

Since the Sheriff's type of ram "involves none of the dangers which the V-100 [allegedly] poses," its similar treatment by the California Supreme Court illustrates the absurdity of rigid a priori characterization of forcible entry devices as being sufficiently "inherently dangerous" to require prior judicial authorization.

Mr. Justice Powell of this Court has pointed out that:

> The public has compelling

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3. (...continued) (Ibid.) In his dissenting opinion, Justice (now Chief Justice) Lucas pointed out that "most police work is inherently dangerous, frequently entailing high-speed chases, gunfire and explosives," all without requiring prior judicial authorization, and that "[n]o compelling reason exists for singling out the V-100 for special treatment" since "the record indicates that the ram has been used on several prior occasions without inflicting any serious injury." (Id. 43 Cal.3d at 44, 233 Cal.Rptr. at 403, 729 P.2d at 838, Lucas, J., dissenting.)

> interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. (United States v. Mendenhall 446 U.S. 544, 561-562 [1980], Powell, J. concurring.)

Part of "the serious societal threat posed by narcotics distribution" (Mendenhall, supra, 446 U.S. at 562; Powell, J., concurring) is the drug-dealers "latest ... tactic," i.e., the "rock house," a heavily fortified, secure structure in which narcotics activity takes place (see Appendix B, post,

affidavit of Gerald W. Boyd, Chief of Police, City of Coronado). It is in this context that the motorized, battering ram was developed. Its purpose was not, as the California Supreme Court suggests, to merely provide "a destructive and dangerous means of forcible entry into an occupied dwelling" (Langford, supra, 43 Cal.3d at 28, 233 Cal.Rptr. at 392-393, 729 P.2d at 827), but rather to defend society against fortified narcotics distribution centers. "Rock houses" are not primarily "dwellings" except in guise and appearance. In reality they are sources of an infection spreading throughout our society primarily attacking our youth, destroying lives, and undermining families. The amount of damage inflicted by a battering ram against such a structure is as nothing compared to the damage

caused by that same "rock house" to the surrounding neighborhood and community. As pointed out by Justice (now Chief Justice) Lucas, "given the fact that the V-100 ram is only used to enter fortified houses where narcotics transactions occur, and that careful administrative scrutiny is required before each use, no Fourth Amendment violation can arise here." (Id. 43 Cal.3d at 45, 233 Cal.Rptr. at 404, 729 P.2d at 838, Lucas, J., dissenting.)

CONCLUSION

The Fourth Amendment does not require prior judicial authorization of police tactics (specifically the motorized battering ram) in the execution of search warrants. The police afford citizens the full protection of the Fourth Amendment when they obtain warrants authorizing searches. Warrants authorizing the means

used for these searches are not encompassed within the Fourth Amendment.

For these compelling reasons of constitutional integrity and public safety, review by this Court is clearly warranted.

Respectfully submitted,

IRA REINER
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM, Head
Appellate Division

DIRK L. HUDSON
Deputy District Attorney

Attorneys for
Amicus Curiae

APPENDIX A

Law Enforcement Official (And Counsel)

Joining In This Brief

CITY OF BARSTOW; BARSTOW POLICE DEPARTMENT

Henry Kraft, City Attorney of Barstow

16239 Victor Street

Victorville, CA 92392

(619) 245-4127

CITY OF DAILY CITY

Tim Murphy, City Attorney of Daily City

333 90th Street

Daily City, CA 94105

(415) 991-8122

CITY OF ESCONDIDO

John Serrano, Assistant City Attorney of Escondido

100 Valley Blvd.

Escondido, CA 92025

(619) 741-4608

CITY OF GRAND TERRACE

Ivan Hopkins, City Attorney

22737 Barton Road, Suite 1

Grand Terrace, CA 92324

CITY OF HUNTINGTON PARK

Elwayne Smith, City Attorney of Huntington Park (Retiring 6/30/87)

(213) 923-9757

Steven N. Skolnik (Newly appointed City Attorney)

2001 Wilshire Blvd., Suite 600

Santa Monica, CA 90403

(213) 829-9843

CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT

John R. Calhoun, City Attorney of Long Beach

333 W. Ocean Blvd., 11th Floor

Long Beach, CA 90802

(213) 590-6061

CITY OF WEST COVINA

Scott Field, Assistant City Attorney

Burke, Williams, & Sorensen

One Wilshire Building, 11th Floor

624 S. Grand Avenue

Los Angeles, CA 90017

(213) 623-1900

CITY OF SANTA MARIA

Art Montandon, City Attorney of

Santa Maria

110 E. Cook

Santa Maria, CA 93454

(805) 928-3781

CORONA POLICE DEPARTMENT

Lance Adair, City Attorney of Corona

Best, Best and Krieger

3750 University, Ste. 400

Riverside, CA 92501

(714) 686-1450

DICK MICHAELSON, SHERIFF OF SONOMA COUNTY

Prentice Fish, Sonoma County Counsel

575 Administration Dr., Rm. 116

Santa Rosa, CA 95401

(707) 527-2421

EDWARD L. MILLER, JR. DISTRICT ATTORNEY OF SAN DIEGO COUNTY

Peter C. Lehman, Deputy District Attorney

101 W. Broadway, Suite 700

San Diego, CA 92101

(619) 236-2369

FLOYD TIDWELL, SHERIFF OF SAN BERNARDINO COUNTY

Alan Marks, San Bernardino County Counsel

385 N. Arrowhead Avenue

San Bernardino, CA 92415-0140

(714) 387-4577

FRESNO POLICE DEPARTMENT

Jeff Hayden, Deputy City Attorney of Fresno

P.O. Box 1271

Fresno Police Department

Fresno, CA 93715

(209) 488-1206

GERALD W. BOYD, CHIEF

CORONADO POLICE DEPARTMENT

Roger W. Krauel, Coronado City Attorney

225 Broadway, Suite 1750

San Diego, CA 92101

(619) 231-3603

JOHN F. DUFFY, SHERIFF OF

SAN DIEGO COUNTY

Janet Houts, Legal Adviser

Special Assistant to the Sheriff

P.O. Box 2991

San Diego, CA 92112 (619) 236-2958

JOHN V. GILLESPIE, SHERIFF OF VENTURA COUNTY

James L. McBride, Ventura County Counsel

800 S. Victoria Avenue

Ventura, CA 93009

(805) 654-2581

PHIL EOFF, SHERIFF OF SHASTA COUNTY

David Frank, Shasta County Counsel

1558 West Street

Redding, CA 96001

(916) 225-5711

PHILIP GENAWAY, CHIEF, ADELANTO POLICE DEPARTMENT

Ivan Hopkins, City Attorney

22737 Barton Road, Suite 1

Grand Terrace, CA 92324

(714) 783-4004

RAYMOND R. BENEVEDES, SHERIFF OF LAKE COUNTY

Cameron Reeves, Lake County Counsel

Courthouse

Lakeport, CA 95453

(707) 263-2321

ROBERT WINTER, SHERIFF OF SANTA CLARA COUNTY

Jim Rees, Santa Clara County Counsel

7070 W. Hedding Street

San Jose, CA 95110

(408) 299-2111

ROY WHITAKER, SHERIFF OF SUTTER COUNTY

Jim Scanlon, Sutter County Counsel

463 Second Street

Yuba City, CA 95991

(916) 741-7110

SANTA PAULA POLICE DEPARTMENT

Phillip Romny, City Attorney of Santa Paula

P.O. Box 912

Santa Paula, CA 93060

(805) 525-6631

SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY

Gary Daigh, Los Angeles County Counsel

500 West Temple Street, Suite 648

Los Angeles, CA 90012

(213) 974-4268

WATSONVILLE POLICE DEPARTMENT

Donald R. Haile, Watsonville City Attorney

250 Main Street

Watsonville, CA 95076

(408) 728-6013

WILLIAM AMIS, SHERIFF OF MERCED COUNTY;

BOARD OF SUPERVISORS OF MERCED COUNTY

Angil Morris, Merced County Counsel

22242 M Street

Merced, CA 95340

(209) 385-7564

APPENDIX B

AFFIDAVIT OF OLIVER TAYLOR

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned affiant hereby declare, under oath, that the following is true and correct:

1) I have been employed as a peace officer for the Los Angeles County Sheriff's Department for 28 years, the last three of which I have been the Chief of the Sheriff's Detective Division. If called as a witness herein, I would and could competently testify to the following facts and circumstances.

2) As Chief of the Detective

Division, I am in charge of various criminal investigative bureaus of the Sheriff's Department including the Homicide, Vice, Juvenile Investigations, Central Investigations, Commercial Crimes and Narcotics Bureaus. In order to effectively investigate this type of criminal activity, search warrants are served under all conceivable circumstances and exigencies. The tactical decisions relating to the proper method of service of these warrants and the degree of force needed to safely and successfully execute them has traditionally been and should remain a law enforcement function. Although this necessity is important in all criminal investigations, it is of particular importance in narcotics investigations.

3. Cocaine "rock houses" are an example of the extent to which criminals will fortify their illegal activities. Because these houses are typically fortified with steel bars and steel reinforced doors, it is extremely difficult to enter such premises using conventional law enforcement resources. It is imperative that law enforcement personnel be free to respond to this kind of sophisticated criminal activity in a quick and effective manner, which may include using innovative tools of their own, such as the Los Angeles Police Department's motorized ram. The Sheriff's Department has developed a Barricade Entry Device which consists of a 16 foot steel pipe mounted onto the front of a heavy-duty mechanized skip loader. After the pole

penetrates the area above a fortified door or window of a "rock house", a lever is automatically released inside the location and the door or window is pulled out. Because the debris and structure portions are pulled away from the building, and entry is made at the upper structure level, there is little danger to the occupants inside. Although the Barricade Entry Device differs in design from L.A.P.D.'s motorized ram, it will be deployed in similar circumstance when the need arises.

4) It is my belief that requiring prior judicial approval before the deployment of such devices will inhibit law enforcement's ability to detect and deter criminal activity and will unnecessarily jeopardize the safety of the

peace officers involved. Such a ruling, if upheld, will deprive law enforcement officers of the on the spot discretion needed to combat the ever increasing, changing and sophisticated criminal activities which create the threats to persons and property to which law enforcement must be allowed to quickly and effectively respond.

s/t/ Oliver Taylor
OLIVER TAYLOR

Subscribed and sworn to and before this 19th day of June 1987 at Los Angeles,

s/t/ Cynthia M. Valenzuela
Notary Public of the State of California for the County of Los Angeles

Official Seal CYNTHIA M. VALENZUELA Notary Public - California Principal Office in Los Angeles County My Commission Expires April 19, 1989

San Diego County

POLICE CHIEFS' & SHERIFF'S

Association . . .

578 ORANGE AVENUE

CORONADO, CALIFORNIA 92118

TELEPHONE (619) 522-7355

I, GERALD W. BOYD, Chief of Police, City of Coronado, California, in my capacity as President of the San Diego County Police Chiefs' & Sheriff's Association, and in support of the Petition for a Writ of Certiorari to the California Supreme Court in the case of Doris Langford, et al. v. the Superior Court of Los Angeles County, Daryl Gates, as Chief of Police, et al., Real Parties in Interest, state the following under penalty of perjury:

The importation, manufacture and distribution of controlled substances is

one of the major law enforcement problems in the County of San Diego, California. As law enforcement techniques improve, defendants react to counter such techniques. The latest defense tactic is the "rock house", a heavily fortified, secure structure in which narcotics activity takes place, guarded electronically, with bars on windows, door security, and closed circuit video. The execution of search or arrest warrants with its attendant knock and notice provisions is a futile act in those situations where the occupants of the premises do not wish to be contacted. Law enforcement personnel attempting to breach the house's security are in extreme danger not only from armed occupants, but also from booby traps, electrically charged wires, and other life-threatening implements.

In response to the development of these fortified "rock houses", the Los Angeles Police Department developed the V-100 battering ram.

The V-100 is only one tool of many which have been used in appropriate situations to gain forcible entry, none of which have ever required prior judicial authorization and all of which fulfill the requirements of the Fourth Amendment. The requirement for prior judicial authorization for use of such devices is both unreasonable and dangerous. If, in service of an arrest or search warrant, the need for such device becomes apparent, and there exists a requirement for judicial approval prior to use, a number of very detrimental consequences may reasonably be predicted. Criminal suspects may utilize the additional time

to further fortify and/or "booby trap" the location to be entered. Suspects may also utilize the time to arm themselves or to destroy evidence.

Once a magistrate has issued an arrest or search warrant, law enforcement authorities should not be hindered in the legitimate exercise of their duties. They should not be subjected to the meaningless approval of a magistrate should they discover fortifications which preclude a forced entry without the aid of the V-100 or other instrumentality. Law enforcement agencies need the V-100 unencumbered by delay to properly execute arrest and search warrants in accordance with their duties.

The requirement of judicial authorization before the Los Angeles Police Department can use its V-100 motorized ram

will have widespread ramifications. Unless reversed by the United States Supreme Court, the ruling will apply to all police departments within the State of California. Additionally, this ruling may logically be extended to include other devices which are used to gain forcible entry. Upholding this ruling could have effects which are potentially injurious to the health, welfare, and safety of police

officers, persons who are the subject of an arrest or search warrant, and the general public.

s/t Gerald W. Boyd
GERALD W. BOYD

SWORN TO AND SUBSCRIBED before me this 17 day of June, 1987,

s/t Gail B. Jordan
Notary Public of the State of California for the County of Los Angeles

Official Seal GAIL B. JORDAN Notary Public - California Principal Office in San Diego County. My Commission Expires March 8, 1989.

Supreme Court, U.S.
FILED
JUN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1932

In The

Supreme Court of the United States

October Term, 1986

DARYL GATES, *et al.*,

Petitioners,

vs.

DOLORES LANGFORD, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE, LOS ANGELES POLICE PROTECTIVE LEAGUE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

STONE & HEALY
MICHAEL P. STONE
3435 Wilshire Boulevard
24th Floor
Los Angeles, California 90010
Counsel for *Amicus Curiae*,
LOS ANGELES POLICE
PROTECTIVE LEAGUE
(213) 382-5444

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

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INTRODUCTION

Amicus curiae, Los Angeles Police Protective League, hereby supports the petition of Daryl Gates, et al., for a writ of certiorari to the Supreme Court of the State of California.

Petitioner seeks review of the decision of the Supreme Court of the State of California in the case of *Langford vs. Superior Court* (1987) 43 Cal.3d 21, which imposed drastic and unprecedented restrictions upon the manner in which law enforcement authorities may execute search warrants issued pursuant to the Fourth Amendment of the United States Constitution.

Consent of all parties to file this brief has been obtained and will be documented under separate cover. The Los Angeles Police Protective League is the recognized representative of sworn Los Angeles Police Officers. *Amicus* has a direct and substantial interest in the outcome of this litigation, since the decision of the California Supreme Court will adversely affect the safety of member officers who are regularly assigned to execute search warrants.

The decision will have an adverse impact upon the ability of law enforcement officers within the State of California such as member officers of *amicus,* Los Angeles Police Protective League, to fulfill their responsibility to protect the public from criminal activity and its attendant danger and nuisance.

The *Langford* decision, if allowed to stand, will place law enforcement at a tactical disadvantage in relation to the operations of organized crime and narcotics traffic, and may compel law enforcement to retreat in the face of the elaborate and sophisticated fortifications behind which

the hard core elements of illicit narcotics trade conduct their business. The decision, as it conflicts with applicable decisions of this Court, also raises a concern for certainty of the law and for uniformity of Constitutional interpretation.

—o—

DISCUSSION

The petition should be granted on the basis of Rule 17.1(c) of the Rules of the Supreme Court of the United States (28 *United States Code*), which provides for a grant of certiorari "when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." In *Langford vs. Superior Court* (1987) 43 Cal.3d 21, the California Supreme Court decided important questions of Fourth Amendment interpretation that have not been, and should be, settled by this Court. The decision conflicts with applicable decisions of this court, especially *Dalia vs. United States* (1979) 441 U.S. 236.

The controversy which produced the *Langford* decision arose when officers of the Los Angeles Police Department used a motorized battering ram to execute a search for contraband at a fortified residence popularly known as a "rock house." The Court granted a writ of mandate enjoining the future use of the battering ram "unless authorized in advance by a neutral magistrate, and unless exigent circumstances develop at the time of entry." 43 Cal.3d at 29. The injunction was based upon the rationale that the battering ram is "inherently dangerous." 43 Cal.3d at 24.

The case presents the general question as to the extent to which the Fourth Amendment restricts the means by which law enforcement officers may execute an otherwise lawful search. The case also raises the issue whether prospective relief is available under the Fourth Amendment against a particular means of executing a search warrant or whether the remedy for such a search is more appropriately limited to damages.

Since the California Supreme Court may have ruled incorrectly on an important issue arising under the U.S. Constitution, and since this ruling conflicts with applicable decisions of this Court, the petition for writ of certiorari should be granted.

1. THE RULE REQUIRING JUDICIAL APPROVAL OF USE IN EXECUTING A SEARCH WARRANT OF INSTRUMENTALITIES DEEMED INHERENTLY DANGEROUS WILL HAVE AN ADVERSE EFFECT UPON LAW ENFORCEMENT

In the *Langford* decision, the California Supreme Court refused to restrict the use of pyrotechnic explosive devices known as "flash-bangs" in executing search warrants. The court stated that "since we are not convinced that the flash bangs are inherently dangerous, we rely on the discretion of law enforcement agencies to determine when and under what circumstances they are to be used." 43 Cal.3d at 24. Consequently, the decision to enjoin the battering ram was predicated upon a conclusion that the battering ram is "inherently dangerous."

The term "inherently dangerous" has been applied in tort law to a wide variety of devices and instruments,

some of which are indeed quite ordinary. The term is more inclusive that the category of "ultrahazardous activities" which are subject to strict liability. Many standard instruments used in police work fall within the "inherently dangerous" category.

The term "inherently dangerous" has been used to describe such unremarkable instrumentalities as a ski chair lift (*Lichina vs. Futura* (D. Colo. 1966) 260 F.Supp. 252); or crude oil with a hydrogen sulfide content (*Hobart vs. Sohio* (N. D. Miss. 1966) 255 F.Supp. 972); or to the activity of unloading dump trucks (*Terry vs. A.P. Green* (E. D. Ark. 1958) 164 F.Supp. 184). In *Ford Motor Company vs. Mathis* (5th Cir. 1963) 322 F.2d 267, the term "inherently dangerous" was applied to an automobile with defective lights, based on its capacity to "plunge the driver in total, sudden, unpredicted darkness." 32 F.2d at 275. By conditioning the use of an instrumentality deemed inherently dangerous upon prior judicial approval, the *Langford* decision would require police to notify a magistrate if they contemplate driving to a search location with lights off. This hypothetical consideration illustrates the extent to which the *Langford* decision could be used to intrude upon traditional matters of proper police discretion. The ruling would invite magistrates to oversee the deliberation of law enforcement authorities on a broad variety of tactical decisions.

No precedent exists for the introduction into Fourth Amendment analysis of a standard of "inherently dangerous" instrumentalities in assessing the reasonableness of a search. This standard, derived from product liability actions between merchants and consumers, is inapplicable to encounters between law enforcement and criminal suspects.

Accordingly, the *Langford* decision should be reviewed by this Court to determine whether the state court has interpreted the Constitution in a manner in conflict with applicable decisions.

2. THE CALIFORNIA SUPREME COURT INTERPRETED THE FOURTH AMENDMENT IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The California Supreme Court distinguished the present action from the case of *Dalia vs. United States* (1978) 441 U.S. 238, which held that a search warrant permitting electronic eavesdropping implicitly authorizes covert entry to install the device.

The *Langford* decision purports to distinguish *Dalia* on its facts. To carry out this analysis, the Court in *Langford* necessarily concluded that the *Dalia* decision was based upon the implicit authority for covert entry derived from the fact that such entry is necessary in virtually every wiretap, and that fact that "covert entry involves minimal destruction of property and danger to persons." 43 Cal.3d at 30. If these distinctions prove to be illusory, *Langford* was simply decided in conflict with *Dalia*.

The authority for covert entry implicit in the judicial approval of a wiretap furnishes no distinction, since authority for forced entry is implicit in a warrant for a house search. The *Dalia* opinion affirms this proposition by reference to this Court's denial of certiorari in *United States vs. Gervato* (3d Cir. 1973) 474 F.2d 40, cert. denied, 414 U.S. 864, cited in *Dalia* at 441 U.S. 258, footnote 19. In *Gervato*, forcible entry of a house to execute a search

warrant for drugs was upheld even in the absence of exigent circumstances. Reversing the trial court ruling that the search was "unreasonable because of the possibility of unnecessary property damage," the court stated that "we do not believe that this alone is a sufficient detriment to make a search unreasonable where a warrant based on probable cause has been obtained." 474 F.2d at 45. Commenting on this case, the *Dalia* opinion rejects the idea that "officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary." 441 U.S. at 258, footnote 19. Contrary to the interpretation of the California Court, the *Dalia* decision suggests that authority for forced entry to execute a house search is equally implicit in the issuance of a warrant as is covert entry for the installation of a wiretap.

The distinction drawn by the *Langford* court based on property damage and personal injury also evaporates in the face of the previously cited language from the *Gervato* opinion. The holding in *Dalia* is not based upon a finding of minimal destruction and danger, as suggested by the California Court, rather the *Dalia* decision recognized that "it is generally left to discretion of the executing officer to determine the details of how best to proceed with the performance of a search authorized by warrant." 441 U.S. at 258.

Since neither distinction drawn by the *Langford* court withstands analysis, the California Court decided *Langford* in conflict with an applicable decision of this court. The *Langford* decision departs from the clear standard articulated in the *Dalia* opinion, that the Fourth Amend-

ment requires only a neutral magistrate, probable cause, and particularity (441 U.S. at 256), and that "nothing in the language of the Constitution or in this court's decisions . . . suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed." 441 U.S. at 258. By imposing additional, unwritten requirements upon the search warrant process, the California court has needlessly introduced uncertainty and complexity into the field of Constitutional interpretation. By placing tactical law enforcement decisions in the hands of judicial authorities, the *Langford* decision deprives officers in the field of the flexibility necessary to respond to changing circumstances, and impairs the ability of law enforcement authorities to protect the public from the operations of sophisticated criminal enterprises in their midst.

3. THE LANGFORD DECISION IMPROPERLY EQUATES CONSTITUTIONAL PRINCIPLES GOVERNING PERSONAL SEARCHES TO THOSE GOVERNING HOUSE SEARCHES

The *Langford* decision improperly applies to house searches a set of Constitutional principles evolved for the purpose of adjudicating the reasonableness of certain personal searches. To guide the magistrate's consideration of the ram, the *Langford* court applied a balancing test (43 Cal.3d at 31) previously articulated in *People vs. Scott* (1978) 21 Cal.3d 284, in a challenge to a court ordered test of the genitals of a suspected child molester. The justification for the additional balancing test required in *Scott* depended upon "the Fourth Amendment's particular solici-

tude for 'personal dignity and privacy.' " 21 Cal.3d at 293.

The court in *Scott* observed that "Circumstances which permit penetration beyond the body's surface are particularly limited, since such intrusions may readily offend those principles of dignity and privacy which are protected by the Fourth Amendment." Accordingly, the court ruled that "the more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure contemplated, or the more it intrudes upon the essential standards of privacy, the greater must be the showing for the procedure's necessity." 21 Cal.3d at 294.

No precedent mandates the application to house searches of the factors that influenced the *Scott* decision. The *Langford* court relies upon *Johnson vs. United States* (1948) 333 U.S. 10 for the proposition that "Evaluation of unusual or dangerous intrusions . . . should not be left exclusively to" police. 43 Cal.3d at 29. However, the *Johnson* case involved only the existence of probable cause, not the means of executing a search after probable cause is shown. There is simply no authority to apply the factors considered in *Scott* beyond the scope of an intrusive personal search.

The *Scott* court required an additional balancing test for intrusive body searches because "in some cases, an intrusion will not be justified even where there is probable cause . . ." 21 Cal.3d at 294-295. Contrary to *Gervato* and other cases upholding forcible entry, the *Langford* decision extends the *Scott* rationale to house searches, on the basis that "although searches of rock houses are directed against residences and not persons, the risk of

incidental injury to human beings is reasonably foreseeable." 43 Cal.3d at 29.

The *Langford* decision means that a house search may not be justified where probable cause exists if the risk of incidental injury is reasonably foreseeable. Under the circumstances of the *Langford* case, was it the battering ram that created the risk of incidental injury? Faced with a fortified house, police executing a search warrant were confronted with the possibility of being captured in a cage, where they could be at the mercy of heavily armed suspects. The ram only shifted some of the danger of injury from the police to the suspect.

Gervato and its progeny establish that a suspect may not defeat a search warrant by locking the door and refusing admittance. *Langford* now says in effect, that a suspect may defeat the purpose of a warrant by creating conditions that make it impossible to enter safely without using a device such as the ram. The *Langford* case thus recognizes that the fortifications of a rock house create a legitimate expectation of privacy!

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CONCLUSION

Amicus finds the *Langford* decision particularly ominous because the battle of wits between law enforcement and the criminal element is subject to constant change and escalation. Today's decision on the battering ram will provide the controlling principles for issues of law enforcement in the future, whatever form these issues may take. Yet the *Langford* decision leaves these principles in doubt.

For example, although decisions of this Court indicate that the authority to make a forced entry is implicit in a warrant for a house search, the *Langford* decision makes an exception when the entry is to be made by a "powerful armed vehicle." 43 Cal.3d at 30. How broad is this exception? The only guidance given by the Court is the standard of inherent danger, which has been shown to be unacceptably broad.

Without establishing a principled basis for this newly imposed Constitutional requirement, the *Langford* court has also ruled that the reasonableness of a law enforcement device may be adjudicated in advance of its use. Seizing upon a finding that "the risk of incidental injury is reasonably foreseeable," (43 Cal.3d at 29) the Court has enjoined the use of a device before this device has ever caused a personal injury. How broad is this newly formed judicial power to enjoin the use of law enforcement equipment? The only test suggested by the Court is whether incidental injury is reasonably foreseeable, a test which may become unmanageably vague when applied prospectively. This test is also subject to abuse, as the risk of incidental injury may be created or enhanced by the suspects themselves to defeat the objectives of law enforcement.

Accordingly, *amicus* joins in petitioning for review of the *Langford* decision, to determine whether the Fourth Amendment restricts the means to execution of a house search, and whether the use of a particular device for executing a house search may be enjoined prospectively.

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Respectfully submitted,

STONE & HEALY
/s/ MICHAEL P. STONE
3435 Wilshire Boulevard
24th Floor
Los Angeles, California 90010

Counsel for *Amicus Curiae*,
LOS ANGELES POLICE
PROTECTIVE LEAGUE
(213) 382-5444